Supreme Court, U.S.
FILED
981619 APR 6 - 1999
OFFICE OF THE CLERK

No. 98-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM D. FERGUSON; ELIZABETH T. FERGUSON;
BONNIE P. TUCKER; JAY T. FRANKEL;
AND BARBARA JEAN COFFMAN,

*Petitioners,*

v.

CITY OF PHOENIX, A MUNICIPALITY;
LYLE RODABOUGH; AND JANE DOE RODABOUGH,

*Respondents.*

## On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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# QUESTIONS PRESENTED

1. Where liability for disability discrimination is proven under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, must an individual with a disability also prove a public entity's discriminatory intent in order to recover compensatory damages?

2. What is the standard for awarding compensatory damages under Title II and Section 504 in light of the conflicting standards cited by the Court of Appeals?

3. Did the petitioners raise a genuine issue of material fact for trial on whether they were entitled to compensatory damages in accordance with the remedial goals of Title II and Section 504?

## PARTIES TO THE PROCEEDING

Petitioners, William D. Ferguson, Elizabeth T. Ferguson, Bonnie P. Tucker, Jay T. Frankel, and Barbara Jean Coffman, were the plaintiffs in the district court and appellants in the court of appeals. Respondents City of Phoenix, Lyle Rodabough, and Jane Doe Rodabough, were the defendants in the district court and appellees in the court of appeals.

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## On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners William D. Ferguson, Elizabeth T. Ferguson, Bonnie P. Tucker, Jay T. Frankel, and Barbara Jean Coffman respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 3, 1998, amended on October 8, 1998, with Petitioners' timely Motion for Rehearing and Suggestion for Rehearing En Banc denied on January 6, 1999.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and the Suggestion for Rehearing En Banc is not reported and is reprinted in Petitioners' Appendix 1. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 157 F.3d 668 (9th Cir. 1998), and is reprinted in Petitioners' Appendix 3. The unreported opinion dated October 18, 1996, of the United States District Court for the District of Arizona which entered "judgment in favor of Plaintiffs on the issue of liability," but entered "judgment in favor of the Defendants on the issues of compensatory and punitive damages," is reprinted in Petitioners' Appendix at 26. The Consent Order dated June 25, 1996, entered by the District Court is not reported and is reprinted in Petitioners' Appendix 43. The District Court's previous findings and rulings are reported at 931 F. Supp. 688 (D. Ariz. 1996). Pet. App. 53.

## JURISDICTION

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1) (1998). The opinion of the United States Court of Appeals for the Ninth Circuit was entered on September 3, 1998, and amended on October 8, 1998. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the United States Court of Appeals for the Ninth Circuit on January 6, 1999.

## STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.* (1998); the United States Department of Justice (DOJ) regulations, 28 C.F.R. Part 35 (1999), implementing Title II of the ADA; and the DOJ *Americans with Disabilities Act: Title II Technical Assistance Manual*, Jan. 1992; Sections 504 and 505 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794 and 794a (1998). Pet. App. 71-76.

## STATEMENT OF THE CASE

### 1. Statement of the Facts

The petitioners are deaf individuals. They use telecommunication devices for the deaf ( TDDs) to communicate by telephone. All of the petitioners, on different occasions, for different emergencies, tried unsuccessfully to call the City's 9-1-1 emergency services by TDD[1].

Petitioner William Ferguson called 9-1-1 on his TDD during the early morning hours of August 14, 1994, to report suspicious individuals outside his home–dangerous circumstances that warranted an urgent priority police response according to City policies. The City 9-1-1 operator hung up on his urgent call, because she did not identify it as a TDD call. When that operator redialed Mr. Ferguson's number, his line was busy because he was trying to call 9-1-1 again. He called 9-1-1 three more times, but received no response to his calls. In the meantime, the prowlers stole his truck. One of the operators did dispatch the police to Mr. Ferguson's home on a lower response level, meaning the police were dispatched with no information about the actual nature of the emergency.

In January 1995, Mr. Ferguson again called 9-1-1 by TDD four times to report vandalism. His first three calls were disconnected. During the fourth call, there were delays, and the operator expressed a lack of knowledge about TDD calls. In August 1995, Mr. Ferguson

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[1] An individual who is deaf, hard of hearing or speech impaired uses a TDD, a keyboard and a screen that displays the text of a conversation. A TDD enables a caller to type text over a telephone line – similar to conversing by electronic mail. A TDD caller dials a telephone number and waits for the answering party to acknowledge receipt of the call. For TDD callers, this means the answering party types a greeting on a keyboard and "GA," which means "go ahead" to signify it is the other party's turn to type. Properly trained 9-1-1 operators can recognize an incoming TDD call in three ways: (1) some TDDs emit an audible tone, similar to, yet easily distinguishable from, the sounds of a computer modem or facsimile machine; (2) some TDDs play a prerecorded voice announcement that notifies the answering party that the caller is using a TDD; and (3) other TDDs manifest a completely "silent open line." Pet. App. 54-55.

called 9-1-1 by TDD to report another prowler, and 9-1-1 operators disconnected the first two of his three calls to obtain emergency services.

Professor Bonnie Tucker and her father, both of whom are deaf, unsuccessfully called 9-1-1 by TDD in November 1995. Her father, who was terminally ill, had been home alone and was unable to reach 9-1-1 for what he believed to be a medical emergency. Professor Tucker, thinking her father was dialing incorrectly, showed him how to place the call. When Professor Tucker called 9-1-1, her first call was disconnected and her second call went unanswered. Professor Tucker had her hearing mother speak to 9-1-1 by voice telephone and tell the operator to use a TDD. Professor Tucker and her mother complained to a 9-1-1 supervisor, who asked Professor Tucker to place more TDD test calls. Professor Tucker complied with the request, but none of her test calls were answered by 9-1-1.

Petitioners Jay Frankel and Barbara Jean Coffman faced similar experiences in December 1995, when they made five 9-1-1 calls to report a theft at their home. Mr. Frankel used a TDD with a voice recorded announcement to notify the answering party that it was a TDD call, but 9-1-1 disconnected each call without a response.

The City, like most local and state governments throughout the United States, provides 9-1-1 emergency services. At all times relevant to the petitioners' claims, the City failed to train its 9-1-1 operators to recognize and respond to the three types of TDD calls. Several operators did not even know it was possible to receive TDD calls. Only two of the City's thirty (30) 9-1-1 operator positions had TDD capability.

The City was on notice of its obligations under Title II of the ADA to make its 9-1-1 emergency services accessible to deaf callers. The DOJ regulations implementing Title II of the ADA became effective January 26, 1992. On August 3, 1994, the DOJ notified public entities, including the City, of obligations under Title II of the ADA to conduct self-evaluations, and to ensure accessibility of 9-1-1 services to deaf callers. Pet. App. 67. The State of Arizona Council

for the Hearing Impaired notified the City of complaints that 9-1-1 was inaccessible to TDD callers. Pet. App. 39. In April 1995, a DOJ-approved training manual was mailed to the City and other public entities addressing the need to modify policies of the type used by the City and to provide effective training to ensure TDD access to 9-1-1. Pet. App. 36.

Individuals who are deaf also gave notice to the City that 9-1-1 services were not accessible to TDD callers. At a public meeting in August 1994, deaf individuals complained to a City 9-1-1 officer about the lack of TDD access. Pet. App. 39. Mr. Ferguson made complaints to the City in August 1994, after his TDD calls to 9-1-1 were repeatedly disconnected by operators. Pet. App. 58. In November 1995, Professor Bonnie Tucker notified the City that its 9-1-1 policies and procedures did not comply with the TDD access provisions under Title II of the ADA, as interpreted in the DOJ Technical Assistance Manual. Pet. App. 39.

## 2. Proceedings Below

### A. District Court

Petitioners filed three separate lawsuits against the City of Phoenix and its Police Commander (hereinafter collectively referred to as the City). They alleged that the City operated a 9-1-1 emergency system in a way that discriminated against persons who are deaf, i.e., they could not call the police, fire department, or ambulance service because the City 9-1-1 emergency system did not respond adequately, if at all, to their calls. Mr. Ferguson's complaint was filed in February 1995; the Tucker complaint in December 1995; and the Frankel/Coffman complaint in February 1996. Each petitioner claimed violations of Title II of the ADA, § 504, and 42 U.S.C. § 1983. They sought declaratory and injunctive relief and compensatory and punitive damages. Petitioners requested a jury trial.

The District Court consolidated the three cases. In November 1995, the United States requested and received leave to participate in the case as amicus curiae to address important issues regarding the

enforcement of Title II of the ADA with respect to direct access to the City's telephone emergency services.

The City filed two sets of summary judgment motions. The District Court granted the first motion in part, with respect to punitive damage claims brought under 42 U.S.C. § 1983, but in all other respects denied summary judgment. *Ferguson v. City of Phoenix*, 931 F. Supp. 688 (D. Ariz. 1996). Pet. App. 70.[2] In that opinion, the District Court made findings of fact with respect to the inaccessibility of the 9-1-1 services to deaf callers and the reasonableness of the DOJ interpretation of Title II of the ADA set forth in its regulations and Technical Assistance Manual. The District Court did not rule on liability at that time, because the parties had not yet addressed the defense of undue burden. The District Court also held that proof of discriminatory intent or deliberate indifference was required for petitioners to recover compensatory damages. Pet. App. 66-67.

Following this ruling, the District Court entered a Consent Order in June, 1996, based upon a settlement reached among the parties and the United States as amicus curiae. The Consent Order required the City to modify its discriminatory policies, to provide effective training to identify and respond to TDD calls, and to provide TDD access at each of its 9-1-1 operator positions. Pet. App. 43-52.

Subsequently, the City filed its second set of summary judgment motions, and the District Court entered final judgment on October 18, 1996. Pet. App. 26. That judgment held the City liable, based upon the Consent Decree, but granted summary judgment in favor of the City on damages. The District Court held, despite the fact that the petitioners had proven liability, they had presented insufficient evidence of discriminatory intent to recover compensatory damages. Petitioners appealed the denial of compensatory damages.[3]

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[2] The petitioners did not appeal the District Court's decision on punitive damages to the Court of Appeals.

[3] Mr. Frankel died during the pendency of his appeal.

### B. Court of Appeals

In a 2-1 decision, the United States Court of Appeals for the Ninth Circuit affirmed the District Court judgment. *Ferguson v. City of Phoenix*, 157 F.3 668 (9th Cir. 1998). Pet. App. 3. The primary question on appeal was whether a showing of discriminatory intent was a prerequisite to the recovery of compensatory damages for violations of Title II of the ADA and § 504.[4]

The majority held that compensatory damages were available under Title II of the ADA and § 504, if and only if the petitioners could prove that the City acted with discriminatory intent. The majority cited this Court's decisions in *Guardians Ass'n v. Civil Service Com'n of the City of New York*, 463 U.S. 582 (1983), *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), and *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998). According to the majority, *Franklin* "merely states that compensatory damages are available for intentional violations." Pet. App. 14. The majority found no "precedent for allowing damages for conduct other than intentional" and that "equitable relief is sufficient to remedy the problem." Pet. App. 13-14. The majority recognized

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[4] Again, the United States filed an amicus curiae brief and participated in the petitioners' argument time to address the importance of the availability of compensatory damages in suits by private plaintiffs, as well as those brought by the Attorney General, under Title II of the ADA and §504. Numerous other disability rights and public interest organizations also addressed this important issue in the role of amicus curiae. In addition to the United States, the eight disability rights organizations, representing more than 50 affiliated organizations that signed the three amici curiae briefs below in support of the petitioners believed that the District Court's standard of requiring petitioners to prove discriminatory intent in order to obtain compensatory damages was erroneous and of far-reaching importance. These amici included: the National Association of the Deaf; the Arizona Center for Disability Law; Disability Rights Education and Defense Fund; Disability Rights Advocates; California Coalition of Agencies Serving the Deaf and Hard of Hearing, Inc.; California Center for Law and Deafness; Institute for Public Representation; Employment Law Center (a Project of the Legal Aid Society of San Francisco); and the World Institute on Disability. The National League of Cities; the United States Conference of Mayors; the League of Arizona Cities and Towns; the International Municipal Lawyers' Association; and 32 members of the California League of Cities submitted a joint amicus brief in support of respondents.

that petitioners had suffered injuries, but held, as a matter of law, that their damages were not compensable because they were not "intentionally inflicted," and there was no "bad faith." Pet. App. 15 n.4, 16.

The majority found that because this Court held in *Guardians* and *Gebser* that compensatory damages were not available under Title VI of the Civil Rights Act[5] and Title IX of the Education Amendments[6] in the absence of intentional violations, compensatory damages were also not available under Title II of the ADA and § 504, absent a showing of discriminatory intent. Pet. App. 13-14, *citing Gebser*, 118 S. Ct. at 1998-99. The majority noted that the District Court had utilized a "deliberate indifference" standard in place of the "discriminatory animus" standard laid out in *Guardians*, but it did not determine which standard was proper, holding as a matter of law that petitioners' claims failed under either standard. Pet. App. 15.

The dissent expressed the view that the majority had misread the statutes, the DOJ regulations, and this Court's law. Congress "never indicated an intent to limit compensatory damages under Title II (of the ADA) to only those plaintiffs who can prove that a discriminatory intent motivated the violator." Pet. App. 18. Reviewing the statutory scheme, the dissent concluded, "what is evident is that if Congress had intended to limit the availability of remedies under Title II, it would have done so" as it did with the other provisions of the ADA. Pet. App. 20.

The dissent distinguished petitioners' case from *Guardians* and *Gebser* by noting that there is only an *implied* private right of action under Title VI and Title IX, but that Congress created an *express* private right of action under Title II of the ADA.

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[5] *See* 42 U.S.C. § 2000d (1998).

[6] *See* 20 U.S.C. § 1681 (1998).

Further, the dissent cited the statutory goals, the legislative history, and Congress's waiver of Eleventh Amendment immunity[7] as support for the availability of compensatory damages where the discriminatory behavior "resulted not from discriminatory animus but from 'bureaucratic inertia' or a 'lack of knowledge and understanding of the law.'" Pet. App. 22.

The Ninth Circuit denied a petition for rehearing and rejected the suggestion for rehearing en banc filed by the petitioners. Pet. App. 1.

## REASONS FOR GRANTING THE WRIT

The key issue presented in this Petition for Writ of Certiorari – the standard for awarding compensatory damages under Title II of the ADA and § 504 – was erroneously decided by a 2-1 vote of a panel of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit held that, to recover compensatory damages, petitioners had to prove that the City acted with discriminatory intent which it defined as animus or deliberate indifference. This standard conflicts with the standards applied by the United States Courts of Appeals for the Second and Seventh Circuits. Finally, the Ninth Circuit misapplied this Court's summary judgment standard.

### I. The decision below contradicts Congress's carefully crafted legislative scheme regarding a compensatory damages remedy available to individuals with disabilities who have been discriminated against by public entities and recipients of federal financial assistance.

There is not one word or phrase in Title II of the ADA or § 504 limiting the availability of compensatory damages to cases of discriminatory animus or deliberate indifference. The Ninth Circuit disregards the statutory language of the Americans with Disabilities Act and the Rehabilitation Act. It ignores the import of limitations

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[7] Congress expressly waived Eleventh Amendment immunity under both the Americans with Disabilities Act and the Rehabilitation Act for violations, making available "remedies both at law and in equity." 42 U.S.C. §12202; 42 U.S.C. § 2000d-7(a)(2).

on compensatory damages which appear in Titles I and III of the ADA, but not in Title II of the ADA. Individuals with disabilities are typically injured not by "invidious animus" but by "thoughtlessness and indifference-by benign neglect." *See Alexander v. Choate*, 469 U.S. 287, 295 (1985). Even the Ninth Circuit admits that such cases of animus would be "most rare." Pet. App. 14. Under the Ninth Circuit's view, the great majority of victims of disability discrimination under Title II of the ADA and § 504 are left without a compensatory damages remedy.

Foremost, Congress has not limited compensatory damages under Title II of the ADA and § 504 to cases of discriminatory intent. The Ninth Circuit's denial of compensatory damages amounts to a judicial reconstruction of both statutes.

Congress knew how to limit remedies under the Americans with Disabilities Act and § 504, and it chose to do so in a number of instances. Where, as here, Congress expresses in one part of a statutory scheme that intent is required to obtain damages but under another part omits the requirement, that omission indicates Congress's deliberate decision to omit the requirement. *See O'Melveny & Myers v. FDIC*, 514 U.S. 79, 86 (1994) (employing doctrine of *expressio unius est exclusio alterius).*

For example, Title III of the ADA expressly limits a private litigant to "preventive relief." A private litigant may not seek damages under Title III of the ADA. 42 U.S.C. § 12188 (1998). Instead, a damages remedy is reserved to the Attorney General in Title III ADA cases. 42 U.S.C. § 12188(b). Title II of the ADA contains no such limitation.

Congress limited damages against employers under Title I of the ADA in several specific ways. 42 U.S.C. § 1981a. For example, compensatory damages are only available in cases of intentional discrimination. 42 U.S.C. § 1981a(a)(2). There is a cap on compensatory damages based on the size of the employer. 42 U.S.C. § 1981a(b)(3). Damages are unavailable when an employer "demonstrates good faith efforts" to make reasonable accommodations. 42 U.S.C. § 1981a(a)(3). Finally, punitive damages are restricted to

cases where an employer acts with malice or reckless indifference to federally protected rights. 42 U.S.C. § 1981a(b).

These limitations are contained in employment cases brought under Title I of the ADA. They are not contained in non-employment cases brought under Title II of the ADA[8]. By contrast, in Title II of the ADA and § 504, Congress made available the full panoply of remedies.

In explicitly waiving the Eleventh Amendment immunity that might otherwise limit Title II ADA damages claims, Congress provided for remedies both "at law" and "in equity" against "a State for a violation of the requirements of this Act." 42 U.S.C. § 12202. *See also* 42 U.S.C.§ 2000d-7(a)(2). This language demonstrates that Congress made compensatory damages, as well as equitable relief, available against public entities for any violation, including an unintentional violation.

The legislative history of the Americans with Disabilities Act reveals that "several key members of Congress assumed that damages would be available for Title II violations." *See* H.R. Rep. No. 101-485(II) & (III) *reprinted in* 1990 U.S. Code Cong. & Admin. News, 303, 322, 381, 445, 475 ("As with Section 504, there is also a private right of action [under Title II] for persons with disabilities, which includes the full panoply of remedies.").[9]

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[8] Other limited defenses are provided in the DOJ regulations implementing Title II of the ADA for temporary interruptions in service or access due to maintenance or repairs, 28 C.F.R. § 35.133, or where the required modification would fundamentally alter the service, or would result in undue financial or administrative burdens. 28 C.F.R. § 35.164.

[9] With the passage of the ADA, the chief sponsor of the bill in the Senate outlined the remedies for violations of Title II:

> Title II of the act, covering public services . . . makes available the rights and remedies available under section 505 of the Rehabilitation Act, and damages remedies are available under the provision enforcing section 504 of the Rehabilitation Act and, therefore, also under title II of this bill.

135 Cong. Rec. S10742, S10760 (Sept. 7, 1989). So too in the House Report, the "private right of action [under title II] for persons with disabilities, which includes

Congress's rationale is readily apparent, but ignored by the Ninth Circuit. In enacting Title III of the ADA, Congress was creating a new right. For the first time places of public accommodation which had never before been subject to laws dealing with discrimination against individuals with disabilities were covered under the statute. In sensitivity to this fact, Congress chose not to afford victims of discrimination under Title III of the ADA the full panoply of remedies. In enacting Title I of the ADA, Congress covered for the first time many employers who had never before been subject to laws prohibiting discrimination on the basis of disability, including employers with as few as fifteen employees. Therefore, in enacting Title I of the ADA, Congress chose to limit remedies to cases of intentional discrimination, and to create a good faith defense.

In contrast, Congress enacted Title II of the ADA to reinforce the non-discrimination mandate already contained in § 504, passed 17 years earlier. With Title II of the ADA and § 504, Congress purposely did not exclude or limit compensatory damages as it did elsewhere in the statutory scheme.

The Ninth Circuit errs in limiting the availability of compensatory damages to cases of discriminatory animus or deliberate indifference and in finding that petitioners had to prove bad faith. The Petition for Writ of Certiorari should be granted to prevent the Ninth Circuit's opinion from becoming a harmful precedent upon which other courts will base decisions affecting millions of Americans with disabilities.

## II. The decision below ignores Congress's expressed prohibition that discrimination against individuals with disabilities includes not only intentional exclusion, but also discrimination due to the failure to make reasonable modifications and remove communication barriers.

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the full panoply of remedies" was noted. H.R. Rep. No. 101-485(II) & (III) *reprinted in* 1990 U.S. Code Cong. & Admin. News 303, 322, 381, 445, 475.

The Ninth Circuit opinion undercuts the civil rights afforded to individuals with disabilities and fundamentally misconstrues the nature and meaning of discrimination based on disability. The majority unwittingly perpetuates discrimination based on its misconception that disability discrimination due to a failure to make reasonable accommodations is not sufficiently abhorrent to merit full relief.

### A. The statutory scheme permits compensatory damages regardless of discriminatory intent in cases where there is a failure to remove communication barriers.

Title II of the ADA was expressly intended by Congress to remedy not only intentional discrimination in the provision of governmental services, but conduct that creates barriers to the receipt of those services by individuals with disabilities. Judicially engrafted limits on remedies for one of the types of discrimination Congress expressly prohibited contravenes the legislative scheme.

Congress specifically recognized that 9-1-1 police and medical emergency telephone services are among the most critical of all public services, mandating that these emergency services be made accessible to individuals who are deaf, hard of hearing, or speech impaired:

> It is the intent of the conferees that the telephone emergency services operated by local and state governments be accessible to such individuals. This means that such telephone emergency systems must be equipped with technology that gives these individuals direct access to emergency services . . . With this title II mandate, individuals with hearing and speech impairments will finally join the rest of us in having immediate access to assistance from police, fire, and ambulance services.

House Conf., H.R. Rep. No. 596, 101st Cong. 2d Sess. at 67-68 (1990), *reprinted in* 1990 U.S. Code Cong. & Admin. News 565, 576-77.

The DOJ regulations implementing Title II of the ADA give explicit notice to public entities of their obligations to make 9-1-1 emergency services accessible to deaf callers. The regulations require public entities to provide "TDDs or equally effective telecommunications systems" in all situations where they communicate with the public by telephone. 28 C.F.R. § 35.161. The regulations also require that "telephone emergency services, including 9-1-1 services, shall provide direct access to individuals who use TDDs and computer modems." 28 C.F.R. § 35.162[10]. Finally, the regulations provide that each public entity must conduct a self-evaluation of its "services, policies and practices, and the effects thereof" in order to determine whether modifications are needed and then to make such modifications. 28 C.F.R. § 35.105.

In enacting Title II of the ADA, Congress thus recognized that individuals with disabilities encountered "various forms of discrimination," and that one of the forms of discrimination that most needed attention was access to 9-1-1. 42 U.S.C. § 12101(5).[11] Pursuant to Congress's directive, the DOJ placed affirmative obligations on public entities to take specific steps to eliminate communication barriers in their 9-1-1 programs. Title II of the ADA and § 504 differ from Title VI of the Civil Rights Act and Title IX of the Education Amendments.

Congress did not intend to incorporate Title VI's discriminatory intent standard in cross-referencing the ADA, 42 U.S.C. § 12133, with § 505 of the Rehabilitation Act, 29 U.S.C. § 794a, which in turn cross-references Title VI of the Civil Rights

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[10] Pursuant to the statute, DOJ provided technical assistance as early as January 24, 1992, to state and local entities as to the methods of complying with these sections of the regulations. 42 U.S.C. § 12206. Pet. App. 75-76. (DOJ Technical Assistance Manual II-7.3100, "additional dialing or space bar requirements are not permitted.")

[11] *See Tyler v. City of Manhattan*, 118 F.3d 1400, 1407 (10th Cir. 1997)(Jenkins, J., dissenting)("Broad enough to cover both disparate treatment and disparate impact discrimination both within and beyond the workplace, the ADA also covers other forms of discrimination including the failure to make reasonable accommodations for the disabled and afford meaningful access to goods, services, jobs, facilities, programs, and activities." )

Act, 42 U.S.C. § 2000d. To do so would be inconsistent with Congress's ban of not only "intentional exclusion," but also the "failure to make modifications to existing facilities" and the failure to remove "communication barriers." 42 U.S.C. § 12105(5)[12]. This Court previously acknowledged that "much of the conduct that Congress sought to alter. . . would be difficult if not impossible to reach were [the Rehabilitation Act] construed to proscribe only conduct fueled by discriminatory intent." *Alexander v. Choate*, 469 U.S. at 296-297.[13]

The affirmative duties imposed by Title II of the ADA and § 504 on local governments, and the remedial nature of both statutes, are consistent with permitting compensatory damages where the discriminatory conduct results not from intent but from "bureaucratic inertia" or a "lack of knowledge and understanding of the law." Pet. App. 22. The Ninth Circuit's discriminatory intent standard contravenes the express purpose of both Title II of the ADA and § 504 with respect to redress for discrimination, by impermissibly limiting compensatory damages for the very conduct Congress explicitly prohibited, i.e. ignorance of the needs of individuals with disabilities or misconceived stereotypes of their needs. At the same time, the Ninth Circuit absolves public entities of the responsibility for redressing the injuries resulting from programs, activities, and services which discriminate against individuals with disabilities. Further, public entities would have no further incentive to police its own compliance with the statutes. Severe restrictions or outright elimination on recovery of compensatory damages for violations of Title II of the ADA and § 504 that do not rise to the level of

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[12] *See* Committee on Labor and Human Resources Report, 101st Congress, 1st Session, Report 101-116 at p. 16. ("Discrimination results from actions and inactions that discriminate by effect as well as by intent or design. Discrimination also includes harms resulting from . . . communication barriers and that adoption or application of standards and criteria and practices and procedures based on thoughtlessness or indifference–of benign neglect.")

[13] *See also Tyler*, 118 F.3d at 1406 (Jenkins, J., dissenting) ("42 U.S.C. § 12132 [Title II] itself does not speak of 'intentional' discrimination as a class of injury distinct from exclusion or other forms of discrimination expressly forbidden by that statute.")

discriminatory intent (animus or deliberate indifference) renders Congress's statutory scheme with respect to the most common forms of discrimination without meaning and effect.

Under the standard developed by the Ninth Circuit in this case, even if an individual's civil rights under Title II of the ADA or § 504 have been violated, no injury is compensable, no matter how serious, unless the individual can show that the injury was inflicted with discriminatory intent. Yet, Congress found all discrimination against individuals with disabilities "abhorrent." This sole focus on the state of mind of the discriminating party is improper in disability discrimination cases, because both Congress and this Court have recognized that "invidious animus" is frequently not an element of the discrimination based on disability that these statutes are designed to prevent and redress.

In focusing solely on the City's discriminatory intent to determine whether the petitioners are entitled to compensatory damages, the petitioners–the intended beneficiaries of Title II of the ADA and § 504–are left without a meaningful remedy for the harms they suffered prior to receiving injunctive relief.

### B. The Court of Appeals holding requiring proof of discriminatory intent fails to adhere to this Court's law regarding the availability of a damage remedy for civil rights violations, unless restricted by Congress.

Congress found that persons "who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. § 12101(a)(4). The ADA was enacted to correct this situation. Yet, the Ninth Circuit ruled that compensatory damages are *unavailable as a matter of law* under Title II of the ADA and § 504 absent a showing of discriminatory intent. The significance of this holding cannot be overstated because it fails to give full import to this Court's holdings in *Guardians*, *Franklin*, and *Gebser*.

Damages are the appropriate form of relief for violations of law that cause compensable harm. *See Bell v. Hood*, 327 U.S. 678

(1946). *See also Smith v. Wade*, 461 U.S. 30, 52, 56 (1971) ("Compensatory damages, by contrast [to punitive damages], are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate.") Indeed, damages are the presumptive form of relief, even if an injunction or other equitable remedy is available to the petitioners. It is axiomatic that a court should determine the adequacy of a remedy at law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate. *Franklin*, 503 U.S. at 75-76.

At issue in this case is nothing less than the most fundamental right Congress recognized for individuals with disabilities–the right to equal access to public services. Restricting or eliminating the right to redress for injuries from violations of federally protected rights is contrary to the basic tenets of American jurisprudence. For every right, there must be a remedy.

*Guardians* involved a Title VI disparate impact claim. At issue was whether intent was required to prove a *violation* of this Spending Clause statute, and thus permit a plaintiff to recover damages under an implied cause of action. The plurality holding in *Guardians* required proof of intent to establish a violation of Title VI and subsequent recovery of damages. In contrast, there is an express cause of action under Title II of the ADA, which contains no explicit limitations on remedies and clearly defines the actions and inactions by public entities that constitute violations, i.e. the failure to make reasonable accommodations and remove communication barriers. Because the District Court has already entered judgment in favor of the petitioners on the issue of liability, the *Guardians* analysis supports petitioners' entitlement to a compensatory damages remedy.[14]

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[14] *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630, n.9 (1984) ("majority of the [*Guardians*] Court agreed that retroactive relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI.")

*Franklin* dealt with a case of intentional discrimination–sexual harassment under Title IX of the Education Amendments, 20 U.S.C. § 1681. *Franklin* is silent on whether compensatory damages were available where discriminatory intent or animus was not proved, because this Court was not faced with the issue. The Ninth Circuit has inexplicably misused *Franklin* precedent to restrict damage claims for violations that do not rise to the level of discriminatory intent or animus.

In *Gebser*, this Court re-emphasized "the general rule that all appropriate relief is available in an action brought to vindicate a federal right." 118 S. Ct. at 1996. This Court also explained that "we generally examine the relevant statute to ensure that we do not fashion the parameters of an implied right in a manner at odds with the statutory structure and purpose. Those considerations, we think, are pertinent not only to the scope of the implied right, but to the scope of the available remedies." *Id.* In the context of an implied right of action and a respondeat superior claim, this Court in *Gebser* found the availability of compensatory damages limited.

While there may have been no further direction from Congress with respect to the implied right of action under Title IX of the Education Amendments, the Ninth Circuit mistakenly assumes that "there is no clear statutory direction from Congress governing the damage issue" with respect to Title II of the ADA and § 504. Pet. App. 13.

In its haste to reconcile this Court's opinions in *Guardians* with *Franklin* and *Gebser*, the Ninth Circuit splices together bits and pieces of these decisions, while ignoring this Court's admonition to concentrate on the statutory direction from Congress. A part of the Ninth Circuit's reluctance to allow for a compensatory damages remedy in cases where it finds a lack of bad faith, discriminatory animus, or deliberate indifference lies in this Court's pronouncement in *Franklin* that it may be inappropriate to award damages in the absence of discriminatory intent where a violation is of Spending Clause legislation. *Franklin*, 503 U.S. at 74-75. This Court further cautioned that where an anti-discrimination law is imposed upon those entities that choose to receive federal funding, the Court will

examine remedies closely to ensure that funding recipients understood that the bargain struck with the federal government included a risk of compensatory damages. *Gebser*, 118 S. Ct. at 1999.

The concerns in *Franklin* and *Gebser* are not at issue here. This is not a respondeat superior case; the City's liability arose from its own acts and official policies. Unlike Title IX, Title II of the ADA is not a contractually based Spending Clause statute, but an outright prohibition on discriminatory actions and inactions imposed on state and local governments regardless of federal funding. Similarly, § 504 was enacted pursuant to the Equal Protection Clause, as well as the Spending Clause. Finally, unlike Title IX, the private right of action under Title II of the ADA is not judicially implied.

Requiring petitioners who have already shown that the City discriminated against them to meet an even higher standard of proof in order to obtain a remedy for that discrimination eviscerates the rights established by Congress and fails to "make good the wrong done." *Franklin*, 503 U.S. at 66, *quoting Bell*, 327 U.S. at 684.

## III. The decision below has created a conflict causing significant confusion in the Courts of Appeals over the proper standard for an award of compensatory damages in cases brought under Title II of the ADA and § 504.

There is conflict among the Courts of Appeals regarding the proper standard for an award compensatory damages under Title II of the ADA and § 504. This Court should clarify the correct standard of law and resolve the inconsistencies in the lower courts. Already pending before this Court is a Petition for Writ of Certiorari in *New York State Board of Law Examiners v. Bartlett*, 156 F.3d 321 (2d Cir. 1998), *cert. pending* 67 U.S.L.W. 3528 (Feb. 8, 1999). In that case, the petitioners asked this Court to clarify the standard for awarding compensatory damages in light of the conflict with *Ferguson*. *Bartlett* deals with an applicant for admission to the state bar who has a learning disability and was denied reasonable

accommodations by the New York State Board of Law Examiners.[15] The Second Circuit found the State of New York liable for compensatory damages under Title II of the ADA and § 504 for failing to make appropriate test modifications. The decision in *Bartlett* conflicts with the Ninth Circuit's decision in *Ferguson* by holding that compensatory damages are available when a public entity implements a policy resulting in the denial of a reasonable accommodation.

The Ninth Circuit applied an intent standard which also conflicts with the decision of United States Court of Appeals for the Seventh Circuit. In *Love v. Westville Correctional Ctr.*, 103 F.3d 558 (7th Cir. 1996)(upholding damage award under Title II of the ADA based on denial of physical access), the Seventh Circuit applied an "intentional" discrimination standard analogous with tort law, i.e., that the conduct was intentional unless it was caused by "mistake, accident, negligence, or another innocent reason." *Love*, 103 F.3d at 560-61. The Seventh Circuit specifically rejected the defense argument that "it may not have known that the access they were affording was unreasonable." *Id.* Rather, the Seventh Circuit held that, "specific knowledge of reasonable accommodation is legally irrelevant" to the finding of intentional discrimination. *Id.*[16]

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[15] *Bartlett* comes to this Court after a lengthy trial with expert testimony and fact witnesses dealing with the issue of reasonable accommodations for a bar applicant with a learning disability. This is contrasted with the petitioners in this case whose fate was decided by summary judgment.

[16] In *Tyler*, 118 F.3d at 1407-1408, the dissent found:

> "Where, as here, Congress has mandated that public entities take affirmative steps to make reasonable accommodations for the disabled, an entity's subjective motivation in failing to carry out its statutory obligations (that is, whether its failure to act was the product of intentional discrimination against the disabled or of neglect or indifference) should not be dispositive."

This led the dissent to cite cases for the proposition that "the compensatory damages remedy may not depend upon proof of intentional discrimination." *Tyler*, 118 F.3d at 1407. *See Niece v. Fitzner*, 922 F. Supp. 1208, 1219 (E.D. Mich 1996); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 133-134) (D. Conn. 1997).

The holding in *Love* requires a court to evaluate the discriminatory conduct in accord with the standard under tort law, i.e. the actor intends to do the act or has a duty but fails to act, not that the actor intends to inflict the harm that results. This standard of law conforms with Congress's mandate that remedies be available both "at law" and "in equity" for a public entity's violation of Title II of the ADA. 42 U.S.C. § 12202[17]. It remedies those injuries, if any, which victims of discrimination can prove. It does not graft the additional requirement mandated by the Ninth Circuit that the violation be with full knowledge and due to intentional animus or deliberate indifference towards individuals with disabilities.

Lower courts have applied inconsistent standards in dealing with compensatory damages under Title II of the ADA and § 504. At various times, courts have referred to "intent," "discriminatory animus,"and "deliberate indifference" with no consistent definition of their meaning in the context of disability discrimination. *See Ferguson*, *Bartlett*, and *Love*. These terms, which look to the conduct of the state or local government, are more appropriate when defining punitive damages, but not when dealing with damages to compensate injured parties[18].

If the Ninth Circuit's interpretation stands, victims of disability discrimination due to a failure to make reasonable accommodations would continue to bear the injury caused by a public entity's violations of Title II of the ADA and § 504. This interpretation undercuts the purpose and effect of these anti-discrimination laws.

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[17] This Court has recognized a corollary between civil rights actions and tort actions–that harms caused by civil rights violations are in the nature of a personal injury. *Memphis Comm'y School Dist. v. Stachura*, 477 U.S. 299, 305 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978).

[18] One court has equated "deliberate indifference" in a Title II ADA case to mean "criminal negligence," citing this Court's opinion in *Farmer v. Brennan*, 511 U.S. 825 (1994). *See Brown v. King County Department of Adult Corrections*, 1998 U.S. Dist. Lexis 20152 (Dec. 9, 1998). The court suggested that "discriminatory animus" meant a "hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap." *Id.* The term "deliberate indifference" has no place in Title II of the ADA and § 504 in cases dealing with compensatory damages for harm caused by a public entity's failure to make reasonable accommodations.

The Petition for Writ of Certiorari should be granted so that this Court can clarify the correct standard of law for compensatory damages claims.

## IV. Petitioners raised a genuine issue of fact for trial as to whether they were entitled to seek redress where they had proved violations of their federal rights.

Despite its protestation to the contrary, the Ninth Circuit compounded its error in adopting an unwarranted standard of discriminatory intent by failing to undertake the required de novo review of the extensive factual record and expert opinions, as required on summary judgment. Pet. App. 17-18. ("The erroneous impression might be given that [the district court's consideration of the evidence] was in fact a bench trial masquerading as summary judgment.") The Ninth Circuit imposed a discriminatory intent standard and placed the burden on the petitioners to show that the City acted in "bad faith." It then turned to the facts to justify the result, treating probative evidence dismissively, improperly weighing the evidence, and drawing illegitimate inferences against the nonmoving parties. The result is to further insulate public entities from compensatory damages remedies for injuries they caused due to their violation of federal laws prohibiting discrimination based on disability.

The Ninth Circuit acknowledged the existence of significant factual disputes. Pet. App. 16. (Factual disputes "as to whether or not the TDD technology had previously been available . . . or that the City even knew about it.) These disputes should have precluded summary judgment. The Ninth Circuit improperly inferred against the nonmoving parties, that (1) "equitable relief is sufficient to remedy the problem;" (2) notice of the petitioners' complaints was insufficient to show "knowledge on the part of the City" to support the damages claims; (3) the City made a "diligent effort" to "upgrade its service" after the lawsuits were filed; and (4) "bad faith" cannot be found from the City's "not uncommon bureaucratic inertia as well as some lack of knowledge and understanding about the [Department of Justice] Manual's requirements." Pet. App. 15. There were credibility and factual disputes to be determined by a jury at trial.

Mere citation to the correct summary judgment standard does not satisfy the Ninth Circuit's obligation to properly apply the summary judgment standard. The Ninth Circuit decided disputed facts, disregarded genuine issues of material fact, and improperly imposed on the victims of discrimination the burden to prove at summary judgment the City's discriminatory animus or intent. Because there was a judgment in favor of the petitioners "on the issue of liability," they were entitled to have a jury determine what injury, if any, they suffered as a result of the City's discriminatory acts, and the amount, if any, of compensatory damages to which they were entitled as a result.

## V. Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

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# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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No. 96-17350
D.C. No. CV-95-0260-RCB

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WILLIAM D. FERGUSON; ELIZABETH T. FERGUSON;
BONNIE P. TUCKER; JAY T. FRANKEL;
BARBARA JEAN COFFMAN,

*Plaintiffs - Appellants,*

v.

CITY OF PHOENIX, A MUNICIPALITY;
LYLE RODABOUGH; JANE DOE RODABOUGH,

*Defendants - Appellees.*

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Decided and Filed January 6, 1999

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Before: WOOD,* RYMER, and TASHIMA, Circuit Judges.

**ORDER**

A majority of the panel has voted to deny the petition for rehearing. Judge Tashima would vote to grant the petition for rehearing. Judge Rymer votes to reject the suggestion for rehearing

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* Honorable Harlington Wood, Jr., Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

en banc and Judge Wood so recommends. Judge Tashima votes to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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No. 96-17350

---

WILLIAM D. FERGUSON; ELIZABETH T. FERGUSON;
BONNIE P. TUCKER; JAY T. FRANKEL;
BARBARA JEAN COFFMAN,

*Plaintiffs - Appellants,*

v.

CITY OF PHOENIX, A MUNICIPALITY;
LYLE RODABOUGH; JANE DOE RODABOUGH,

*Defendants - Appellees.*

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Argued and Submitted November 4, 1997
San Francisco

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Filed September 3, 1998

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Amended October 8, 1996

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Jessica Dunsay Silver, United States Department of Justice, and Gregory B. Friel, United States Department of Justice, Civil Rights Division, Washington, D.C., for the amicus United States of America.

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## OPINION OF THE COURT

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Before Harlington Wood, Jr.,* Pamela Ann Rymer, and A. Wallace Tashima, *Circuit Judges.*

WOOD, JR., *Circuit Judge.*

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* The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, is sitting by designation.

Plaintiffs, who are deaf or hearing impaired, in lieu of the common telephone must rely on telecommunications devices (TDDs). TDDs are considered standard communication equipment for those with a hearing disability in order to enable them to communicate by telephone, including making 9-1-1 emergency system calls. Three separate lawsuits, later consolidated, seeking declaratory, injunctive and damages relief, were filed in February 1996 by plaintiffs against the City of Phoenix (City). The City was alleged to have operated its 9-1-1 emergency service in a way which discriminated against individuals with plaintiffs' hearing disabilities in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("Title II"); Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 794 and 794(a)(" § 504"); and 42 U.S.C. § 1983. Additionally named as defendant in his individual capacity was Lyle Rodabough, Commander of the Phoenix Police Department's Communication Bureau.[1]

The district court granted summary judgment to defendants after concluding that compensatory damages were not available in cases of unintentional discrimination. Plaintiffs appeal.[2]

## BACKGROUND

Plaintiffs allege that the City's 9-1-1 emergency system did not respond effectively, if at all, to plaintiffs' TDD emergency calls. The use of a TDD to communicate is similar to the use of electronic mail. Each party must be equipped, the caller and the called, with a TDD

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[1] Plaintiffs also named defendant Rodabough's wife as a defendant, which they assert is required in order to comply with Arizona community property laws.

[2] This court has had the benefit of amicus briefs of the United States National Association of the Deaf jointly with the California Coalition of Agencies Serving the Deaf and Hard of Hearing, Inc., supporting plaintiffs. The Arizona Center for Disability Law filed a two-page letter as amicus curiae also in behalf of plaintiffs. The National League of Cities, together with United States Conference of Mayors, League of Arizona Cities and Towns, International Municipal Lawyers' Association, and in addition thirty-two member cities of the California League of Cities filed amicus briefs in behalf of the defendants.

which has a typewriter-like keyboard and a screen. The TDD caller types a message which can be transmitted by telephone line to the recipient's TDD screen. Most TDDs have a space bar feature which causes the emission of an audible signal at the receiving end of the line when the caller presses it. Not all TDD machines, however, emit an audible signal.

Prior to 1995, under the City's 9-1-1 system, a TDD caller was required to press the space bar when initiating a 9-1-1 call. The emergency operator who received a TDD call was expected to recognize it as a TDD call by the audible signal. If that operator was equipped with a TDD, he could then respond. If the operator was not TDD-equipped, the call was switched manually to a TDD-equipped operator for a response. Sometimes, it is explained, the audible signal was not recognized by the operator or there was no audible signal as the caller neglected to press the space bar.

Generally, when TDD users initiate telephone calls, they dial a telephone number and then wait for the person receiving the call to answer the call by typing "GA," meaning "go ahead." The callers do not begin typing a message until they receive the go ahead from the person receiving the call. Under the City's old 9-1-1 system, if a caller did not press the space bar when initiating an emergency call or if the operator did not recognize the audible signal as a TDD call, the call would be treated as a 9-1-1 hang-up. The City's hang-up policy was for the operator to disconnect the 9-1-1 call and then try to call back. If the operator was unable to contact the caller, the police as a precaution were dispatched to the place where the 9-1-1 call had originated to check on a possible emergency situation, but on a less priority basis than a call for a known emergency. It is claimed that the City in a year receives approximately two million 9-1-1 emergency system calls, of which only a very small percentage are TDD calls.

The significance of an alleged lack of an effective 9-1-1 response from the City can be better understood by briefly setting forth some of the 9-1-1 experiences alleged by plaintiffs, although fortunately none had tragic consequences. Plaintiff Ferguson, for

example, early in the morning saw two suspicious figures outside his family home. He used his TDD to call 9-1-1 four times for help, but each time he was disconnected. When Ferguson saw the prowlers break into his pickup truck and drive it away, he gave up on 9-1-1 and chased after the thieves himself. The police arrived, but too late to help.

Ferguson's complaints to the City resulted in an explanation by Commander Rodabough that Ferguson had not been disconnected, but in three of his four 9-1-1 calls he had failed to use his TDD space bar correctly to alert the operator. His fourth call, it was claimed, was answered and the 9-1-1 operator sent him a message, but Ferguson himself failed to respond, possibly because he was already out in the street chasing after his truck. During another incident later that same year Ferguson was unable to promptly report vandalism in progress next door to his home though he claimed he had used the 9-1-1 system correctly. He blamed his 9-1-1 problem on the lack of adequate training of the City's 9-1-1 personnel.

Plaintiff Bonnie Tucker is deaf, as is her father. On one occasion, when Tucker's father was seriously ill, he attempted to contact 9-1-1 by his TDD for what he believed was a medical emergency. His call did not receive a response. Plaintiff Tucker placed another 9-1-1 call and also got no response. On her second attempt, she was able to communicate with the 9-1-1 operator. At that time, Tucker notified the City of their 9-1-1 difficulties. At the request of the City she undertook to test their TDD system again. The system failed to work during her first two test calls, but functioned on the third call.

Plaintiff Frankel also had 9-1-1 problems. On one occasion in 1995, Frankel unsuccessfully attempted to call 9-1-1 five times on his TDD to report a theft from his residence. City officers did arrive at Frankel's residence in accordance with their hang-up response policy; however they did so on the non-emergency response basis. While the officers were at Frankel's residence a 9-1-1 test call was made, but that call was likewise disconnected. Frankel's prime concern was for his father who lived with him and who had a serious

heart condition which might cause need for an emergency 9-1-1 response.

Plaintiffs filed a complaint against the City, alleging that the City's 9-1-1 system ineffectively served the deaf. Plaintiffs claimed that this conduct violated Title II of the ADA, § 504 of the Rehabilitation Act, and § 1983. The City responded to plaintiffs' complaint with a motion for summary judgment. Partial summary judgment was granted to the City on plaintiffs' § 1983 claims on the basis that municipalities are immune from punitive damage under that section. *Ferguson v. City of Phoenix*, 931 F. Supp. 688, 698 (D. Ariz. 1996) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981)). The district court denied the remainder of defendant's summary judgment motion on the merits. 931 F. Supp. at 693-98. The district court held that plaintiffs could not recover compensatory damages unless they could prove that the City intentionally discriminated against them. This standard was defined by the district court to include conduct which could be viewed as intentional if the City, at a minimum, acted with deliberate indifference in situations where there was a strong likelihood that the City's conduct could result in a violation of federally protected rights. *Id.* at 697. Appropriate discovery, the district court held, was to be permitted for plaintiffs to explore the issue. The court, however, found that the plaintiffs up to that point had failed to show any intentionally discriminating conduct or deliberate indifference whatsoever. *Id.*

Plaintiffs claimed the whole factual background of their case evidenced intentional discrimination. In general, they blamed the City's official policies and practices as well as the City's alleged continuing and knowing violations of plaintiffs' civil rights for more than a year. In particular, plaintiffs' allegations were that only deaf callers had to use a TDD space bar and thereby were treated differently than non-hearing impaired callers; sometimes the 9-1-1 TDD system did not function for them; only TDD 9-1-1 calls had to be transferred on occasion to a 9-1-1 ancillary operator position equipped with TDD capability, slowing down the 9-1-1 process; the

9-1-1 TDD training of operators to recognize and respond to TDD calls was inadequate; the City neglected to perform the necessary self-evaluation of its TDD system; the City neglected to take corrective action after it knew of the deficiencies; and finally, that Commander Rodabough had failed to take any corrective actions before a partial settlement consent order was entered during the course of this litigation. Those allegations were enough, plaintiffs claimed, to show intentional discrimination, if an intentional showing was necessary which plaintiffs now dispute, and consequently were enough to justify compensatory and punitive damages. Plaintiffs' complaint alleged intentional and deliberate discrimination, and plaintiffs argued that intentional discrimination was shown, but now on appeal plaintiffs claim they are presumptively entitled to damages for unlawful discrimination without regard to intent under the ADA, the Rehabilitation Act, or § 1983.

Title II of the ADA provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Section 504 of the Rehabilitation Act provides:

> [N]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794.

To help effectuate these statutory mandates the Department of Justice (DOJ) under the authority of 42 U.S.C. § 12134(a) promulgated regulations regarding the responsibilities of state and

local government to disabled persons, including the deaf or hard of hearing. Those regulations require that "telephone emergency services, including 911 services, shall provide direct access to individuals who use TDDs and computer modems." 28 C.F.R. § 35.162. The regulations further provide that a public entity shall "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a). See also 28 C.F.R. § 35.161 (stating that where a public entity communicates with the public by telephone, TDDs must be used to allow communication with the hearing impaired). Further, public entities are required, if necessary, to make "reasonable modifications" in their services to accomplish these goals, 28 C.F.R. § 35.130(b)(7), or to provide new facilities. 28 C.F.R. § 35.151. The DOJ, deeming its regulations needed interpretation, published The Americans with Disabilities Act: Title II Technical Assistance Manual, Nov. 1993 & 1994 Supp. ("Manual"). The Manual specifically prohibits the space bar policy utilized by the City:

> Additional dialing or space bar requirements are not permitted. Operators should be trained to recognize incoming TDD signals and respond appropriately. In addition, they also must be trained to recognize that "silent" calls may be TDD or computer modem calls and to respond appropriately to such calls as well.

Manual, II-7:3100 at 42.

In its order on defendants' first motion for summary judgment, the district court found the DOJ interpretations of the statutes and its regulations to be reasonable. *Ferguson*, 931 F. Supp. at 695. The district court noted that, in 1994, the Mayor of Phoenix had been sent a letter from the Department, but that it only generally advised of the Department's ADA regulations. *Id.* at 697. The letter made no specific mention of space bars being outlawed, nor had the DOJ's view of the binding nature of the provisions of its Manual been pointed out to City officials. *Id.* The court viewed the Department's letter as only encouraging, not requiring, the City to make 9-1-1

changes. The court found no evidence that the City actually knew of the binding nature of the Manual's requirements and noted that plaintiffs were disregarding the other qualities of the City's 9-1-1 system and the City's efforts to address their concerns. *Id.*

After the court's decision on defendants' first motion for summary judgment, the parties entered into a consent decree, settling the injunctive issues, but leaving unresolved the question of damages. The settlement among other things required the City to eliminate the need for TDD callers to use a TDD space bar to gain access to the 9-1-1 system. The City's 9-1-1 system consequently has now been improved, and we are aware of no continuing problems.

The lawsuit continued on the question of damages. Following discovery by plaintiffs, the parties filed cross motions for summary judgment. The court found no evidence of intentional City discrimination or deliberate indifference and entered final judgment barring compensatory damages under the statutes. That being so, punitive damages were not considered. The court added that although there was no basis for damages against Commander Rodabough that he, in any event, was entitled to qualified immunity.

## ANALYSIS

As we review the summary judgment rulings of the district court and its interpretation of the statutes we do so *de novo*. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir.), *cert. denied*, 139 L. Ed. 2d 401, 118 S. Ct. 559 (1997); *Allen v. Shalala*, 48 F.3d 456, 457 (9th Cir. 1995).

The principal question remaining in this appeal is whether a showing of intentional discrimination is a prerequisite to the recovery of damages by plaintiffs when violations of the ADA and the Rehabilitation Act have occurred. Plaintiffs argue that compensatory damages are presumptively available to them for the City's alleged violation of their federally-protected rights, relying on *Franklin v. Gwinnett*, 503 U.S. 60, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992). The presumption is based on the doctrine, plaintiffs argue, that "the right to recover the damages from the party who

violated the statute" is essential "to make good the wrong done." *See Franklin*, 503 U.S. at 66. The plaintiffs fault the district court for not citing *Franklin* and taking it into consideration before entering summary judgment for the City denying damages. We shall examine *Franklin* in due course.

In opposition to plaintiffs' view, the City argues that there must first be proof of intent to discriminate before damages are appropriate. The City relies on *Guardians Association, etc., et al., v. Civil Service Commission of New York, et al.*, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983).

The district court granted plaintiffs injunctive relief which remedied the 9-1-1 violations. Plaintiffs concede in their reply brief that no Supreme Court opinion directly addresses the discrete issue of whether intent is required to recover damages from a public entity under the ADA or the Rehabilitation Act. That being so we must, with caution, find our way, relying on what other guidance may be available.

By statute, the remedies for violations of the ADA and the Rehabilitation Act are co-extensive with each other, 42 U.S.C. § 12133; 29 U.S.C. § 794a(a)(2), and are linked to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq*. These statutes require that ADA and Rehabilitation Act remedies be construed the same as remedies under Title VI. States are no longer immune from damages. 42 U.S.C. § 2000d-7(a)(2).

We begin our analysis with a consideration of Title VI. Damages are available under Title VI, but the statute is silent about the possible need for proof of discriminatory intent. Plaintiffs argue that *Franklin v. Gwinnett*, 503 U.S. 60, 70-71, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992), makes clear that compensatory damages are available regardless of proof of intentional discrimination. *Franklin*, however, dealt with intentional violations and no mention is made in *Franklin* of damages for other than intentional violations. *Franklin* reiterates the general rule that "absent clear direction to the contrary by Congress, the federal courts have the power to award any

appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin*, 503 U.S. at 70-71. *Franklin*'s statement of that general rule comes at the conclusion of the court's discussion about damages being available for intentional violations. That general rule in the *Franklin* context, however, cannot fairly be broadened to be a precedent for allowing damages for conduct other than intentional. *Cf. Gebser v. Lago Vista Indep. School Dist.*, 141 L. Ed. 2d 277, 118 S. Ct. 1989, 1999 (1998) ("In the absence of further direction from Congress . . . we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."). That is so even though there is no clear statutory direction from Congress governing the damage issue. *Cf. Id.* *Franklin* does not explain what relief may be appropriate in cases of unintentional violations, so we must turn our analysis elsewhere.

*Franklin* cites *Guardians Association, etc., et al. v. Civil Service Commission of the City of New York, et al.*, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), which we now examine. *Guardians* is comprised of a number of concurrences and dissents, but that does not mean it is not useful. From *Guardians* comes the majority message that in the absence of proof of discriminatory animus, compensatory relief should not be allowed under Title VI. *Guardians*, 463 U.S. at 607 n.27.

Appellants argue that *Guardians* is distinguishable and not applicable because Title VI was enacted under the Spending Clause of the Constitution and is therefore subject to different considerations than the ADA and the Rehabilitation Act. While it is correct that Title VI was enacted under the Spending Clause, it does not necessarily follow, as appellants claim, that only in Spending Clause cases, not others, are compensatory damages to be limited to intentional violations. Moreover, as discussed above, Title II and § 504 are expressly linked to Title VI. Appellants also question the validity of *Guardians* post-*Franklin*. However, the Court in *Franklin*

acknowledged *Guardians* and left it intact. *Franklin*, 503 U.S. at 70. *See also Gebser*, 118 S. Ct. at 1998 (citing *Franklin* and *Guardians* together and discussing *Guardians* without suggesting that it has been overruled or undermined); *Lane v. Pena*, 518 U.S. 187, 116 S. Ct. 2092, 2096, 135 L. Ed. 2d 486 (1996) (citing *Franklin* for the interpretation that a "clear majority" of the Court in *Guardians* confirmed that damages were available for intentional violations of Title VI). Therefore, *Franklin* must be read as consistent with *Guardians*. *Franklin* reiterates that in the absence of Congressional statement to the contrary, "all appropriate remedies" are available to plaintiffs. The holding in *Franklin* merely states that compensatory damages are available for intentional violations of Title IX. That holding is consistent with the holding in *Guardians* and with our holding today that compensatory damages are not available under Title II or § 504 absent a showing of discriminatory intent.[3] Plaintiffs argue that intentional discrimination will, by the nature of things, usually be impossible to discern and prove. Hopefully, that difficulty of proof is because any intentional discrimination against the hearing impaired, being abhorrent, would be most rare.

Substantial corrective remedies are available to plaintiffs, however, regardless of intent. In the present case, equitable relief is sufficient to remedy the problem. The principal purpose of this litigation as evidenced by the prayers for relief was to gain declaratory and permanent injunctive relief compelling compliance with the ADA and the Rehabilitation Act. The corrective action has

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[3] We find that in the two other circuits where this issue has been specifically considered it has been held that compensatory damages are not available for unintentional violations of the Rehabilitation Act. *Wood v. President and Trustees of Spring Hill College*, 978 F.2d 1214 (11th Cir. 1992); *Carter v. Orleans Parish Pub. Schs.*, 725 F.2d 261 (5th Cir. 1984).

already been taken by the City, so the basic problem itself has been solved.[4]

The district court found no intentional violations, even saying that plaintiffs' evidence "is hardly the stuff of intentional conduct or deliberate indifference." *Ferguson*, 931 F. Supp. at 697. Later in the litigation, plaintiffs were given discovery opportunities to try to establish intentional discrimination. Although the plaintiffs did not receive all the discovery they desired, most of their discovery demands were reasonably responded to by the City. In some instances what plaintiffs sought either did not exist, or would have been unduly burdensome without any likely value to plaintiffs worth the effort in these circumstances. We find no clear abuse of discretion in the district judge's discovery rulings.

The district court held that in order to show intentional discrimination, the plaintiffs had to show that the City had been "deliberately indifferent to the strong likelihood that their action or inaction was violating plaintiffs' federally protected rights." In so doing, the court utilized a "deliberately indifferent" standard in place of the "discriminatory animus" test laid out in *Guardians*. *Guardians*, 463 U.S. at 584. In the present case, we need not determine which standard is proper, since plaintiffs' claims fail under either one. In light of the evidence in the record, the situation clearly appears to be no more than at times some not uncommon bureaucratic inertia as well as some lack of knowledge and understanding about the DOJ Manual's requirements. There is nothing to show, even suggest, any deliberate indifference or discriminatory animus on the part of the City towards plaintiffs.

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[4] Fortunately, the sometimes inadequate 9-1-1 system for these plaintiffs in their particular circumstances was not as serious a problem as it might otherwise have been. While plaintiffs claim "extreme frustration, humiliation and emotional distress," which is understandable, they showed no specific or particularized damages in opposition to the City's motion for summary judgment, except for the fact that Ferguson's stolen truck was not recovered. Although there is no evidence that it was not insured, if it were, that loss as well as the damages that others could prove would, of course, be compensable if intentionally inflicted.

There is a factual dispute between the parties as to whether or not the TDD technology had previously been available for acquisition by the City to avoid the space bar requirement, or that the City even knew about it. It is claimed the City was given notice of the alleged deficiencies by plaintiffs and others, but even so any evidence of deliberate indifference or discriminatory animus is totally lacking. Complaints about the City's 9-1-1 problems appear to have been only sporadic and little different from what other municipalities have experienced when trying to install and operate an emergency system for the benefit of the public. While this suit was in progress improvements were being made. Operators did receive repeated training, but human error mishaps, the City reasonably argues, are to be expected from time to time. We find nothing to suggest that the City received alleged numerous and repeated complaints to which it did not respond. In fact, the evidence was to the contrary. The district court in its final order noted that a witness who was a former 9-1-1 TDD trainer for the Arizona Counsel for the Hearing Impaired, a state agency, had received "sporadic" complaints about 9-1-1 access, but could not recall how many of those were about the City's 9-1-1 service. The TDD trainer further averred that when she did contact the City about a 9-1-1 complaint it was checked by the City's 9-1-1 Center and a follow-up was always done. The district court found that there were no genuine issues of material fact in dispute which under the common summary judgment standard would preclude summary judgment in favor of the City and Commander Rodabough, nor do we. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

The district judge also found there was no actual showing of inadequate training and nothing to put the City on notice of any inadequacy. Further the court found there was internal self-investigation into the level of its 9-1-1 service followed by diligent effort by the City to upgrade its service. We see no bad faith on the part of the City, nor did the district judge. As Justice White acknowledges in *Guardians*, "it is not uncommon in the law for the extent of a defendant's liability to turn on the extent of his

knowledge and culpability." *Guardians*, 463 U.S. at 597 n. 20; see also *Gebser*, 118 S. Ct. at 1999 (requiring, under Title IX, a showing of actual notice and then deliberate indifference by one with the authority to respond in order to recover damages). That knowledge may be clearer under Spending Clause legislation due to the conditions imposed and accepted in advance of receiving government financial assistance. 463 U.S. at 596. In the present case, that knowledge on the part of the City was not shown to support a discrimination charge. There was no discrimination shown to qualify plaintiffs for damages even as it was defined in part by the district court to mean "deliberate indifference."

It can be seen from the foregoing discussion that Commander Rodabough is no more liable for damages than is the City. The district court held, however, that Commander Rodabough was entitled to qualified immunity. We review this decision *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516, 127 L. Ed. 2d 344, 114 S. Ct. 1019 (1994). To determine if an individual is entitled to qualified immunity, we must determine (1) the specific right allegedly violated; (2) whether this right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) whether a reasonable officer could have believed that the conduct was lawful. *Kelley v. Borg*, 60 F.3d 664, 666 (9th Cir. 1995) (citation omitted). In the present case, the right allegedly violated was the right of deaf 9-1-1 users to be free of the space bar policy when that policy was expressly prohibited by the DOJ Manual. The merits of that decision are not before us. Rodabough could not have been held to understand the law and its requirements at a time when the law was only developing. In its final order, the court noted that both parties had urged the court to publish its earlier order because it was the first court in the country to recognize the binding legal effect of the DOJ's manual. Therefore, we conclude that the right at issue was not clearly established, and as a result, Commander Rodabough was entitled to qualified immunity.

Because of the district court's careful consideration of all the evidence, the erroneous impression might be given that it was in fact

a bench trial masquerading as summary judgment, but that is not the case. It was a proper use of summary judgment. Appellants, although unsuccessful as to damages, nevertheless made a good and diligent effort in trying to justify damages in addition to the other substantial relief they did achieve.

The judgment of the district court must be AFFIRMED.

TASHIMA, Circuit Judge, dissenting.

I respectfully dissent from the majority's holding that compensatory damages are not available under Title II of the Americans With Disabilities Act (ADA) without a showing of discriminatory intent. Maj. op. at 11771.[1]

It has been established that compensatory damages are available for intentional violations of Title VI. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 70, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992) (citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983)). Damages, therefore, are also available for violations of section 504 of the Rehabilitation Act ( § 504) and Title II of the ADA. *See* 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 12332. The majority accepts the argument of defendant City of Phoenix (City) that if a Title VI plaintiff must prove intentional discrimination in order to recover damages, a Title II plaintiff also must do so. Congress, however, has never indicated an intent to limit compensatory damages relief under Title II to only those plaintiffs who can prove that a discriminatory intent motivated the violator.

In *Franklin*, the Supreme Court noted the "longstanding rule" that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 66,

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[1] The majority leaves open the question of what will suffice as a showing of an intentional violation — whether a "discriminatory animus" must be shown, or a showing of "deliberate indifference" is sufficient. Maj. op. at 11772.

70-71. The Court held that damages were available under Title IX of the Education Amendments of 1972. It ruled that "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 66. Although *Franklin* involved an allegation of intentional discrimination, the Court did not limit its general holding to cases of intentional discrimination. The Court, however, did indicate that it may be inappropriate to award damages in the absence of discriminatory intent where a violation is of Spending Clause legislation. *Id.* at 74-75.

The Supreme Court revisited *Franklin* in *Gebser v. Lago Vista Indep. Sch. Dist.*, 141 L. Ed. 2d 277, 118 S. Ct. 1989 (1998). There, it stated that because "the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." 118 S. Ct. at 1996. The Court concluded that a victim of sexual harassment could not recover damages from a school district due to the "contractual nature" of Title IX, unless school officials had actual knowledge of the discrimination and were deliberately indifferent to it.

*Gebser*'s decision not to permit damages in a Title IX case under a theory of respondeat superior liability or constructive notice is clearly distinguishable from this case for several reasons. First, this is not a respondeat superior case. Here, the City's liability arises from its own acts and official policies. Second, Title II, unlike Title IX, is not Spending Clause legislation. Third, here, the private right of action is not judicially implied.[2] *Gebser*, however, also noted that *Franklin*'s "general rule" in favor of all appropriate relief "yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved." *Id.* at 1996 (quotations omitted). According to *Franklin* and *Gebser*, damages presumptively should be available in this case unless either Congress

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[2] Although Congress used a shorthand in drafting Title II whereby the remedies are defined by cross-reference to the well-established implied right of action under Title VI, Congress explicitly provided for a private right of action and a remedial scheme. *See* 42 U.S.C. § 12133; *see also Gebser*, 118 S. Ct. at 1996.

expressly limited the remedies available under Title II to instances of "intentional" discrimination, or permitting damages in the absence of a discriminatory intent would frustrate the purposes of Title II.

There is no "clear direction from Congress" in the text of Title II that it intended to limit the available remedies. Title II remedies are coextensive with those available under section 505 of the Rehabilitation Act.[3] 42 U.S.C. § 12133. Section 505, in turn, provides that "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" are available. Title VI does not have a remedies provision, but its judicially implied remedies were already well-established by the time the ADA was enacted in 1990. *See Cannon v. University of Chicago*, 441 U.S. 677, 710-11, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979) (When it passed Title IX in 1972 "Congress was under the impression that Title VI could be enforced by a private action."). Title II prohibits disability discrimination by public entities. Title VI prohibits racial discrimination by any program or activity receiving federal funds. Section 504, like Title VI and Title IX, but unlike Title II of the ADA, is limited to recipients of federal funds. "By incorporating one section after another by reference—sections that mesh only imperfectly—Congress could not have made its meaning less clear." *Tyler v. City of Manhattan*, 118 F.3d 1400, 1409 (10th Cir. 1997) (Jenkins, J., *dissenting*).

What is evident is that if Congress had intended to limit the availability of remedies under Title II, it would have done so as it did with Title III of the ADA. *See* 118 F.3d at 1412. Title III relies on the remedies available in Title II of the Civil Rights Act of 1964. 42 U.S.C. § 12188(a)(1). Title II of the Civil Rights Act explicitly limits relief to "preventive relief." 42 U.S.C. § 2000a-3(a). *Compare* 42 U.S.C. § 12133 with 42 U.S.C. § 12188(a)(1).

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[3] Section 505(a)(2) contains the relevant remedy provisions for violations of § 504. 29 U.S.C. § 794a(a)(2).

The legislative history also indicates that several key members of Congress assumed that damages would be available for Title II violations. *See Tyler*, 118 F.3d at 1411-14 (Jenkins, J., *dissenting*) (summarizing legislative history). Senator Harkin, the ADA's chief sponsor in the Senate, stated:

> [Under titles I & III of the ADA], the bill expressly limits relief to equitable remedies. However, title II of the act, covering public services, contains no such limitation. Title II of the bill makes available the rights and remedies also available under section 505 of the Rehabilitation Act, and damages remedies are available under that provision enforcing section 504 of the Rehabilitation Act and, therefore, also under title II of this bill.

135 Cong. Rec. S10742, S10760 (Sept. 7, 1989). In the House Report, Congress indicated a concern over what remedies would be available to make Title II effective in combating discrimination. *See* H.R.Rep No. 101-485(II) & (III) reprinted in 1990 U.S.C.C.A.N. 303, 322, 381, 445, 475. The Report notes: "As with section 504, there is also a private right of action [under Title II] for persons with disabilities, which includes the full panoply of remedies." *Id.* at 381. *Franklin* indicates that the law always has been that all appropriate remedies are available unless Congress has said otherwise. Therefore, Congress would have expressly limited Title II's remedies when it passed the ADA in 1990, if such a limitation were intended. Instead, the "full panoply of remedies" were intended to be available to victims of disability discrimination when Title II was violated.

While Title VI remedies determine which remedies are available under Section 505 and Title II, it does not necessarily follow that, because damages are "inappropriate," absent intentional discrimination under Title VI, that is true for Title II. As mentioned above, Title II, unlike Title VI, was not enacted pursuant to the Spending Clause. In *Guardians*, Justice White reasoned that the Pennhurst presumption that "only limited injunctive relief should be

granted for unintended violations of statutes passed pursuant to the spending power" applied to Title VI. 463 U.S. 582 at 602, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 15, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981)). *See also Gebser*, 118 S. Ct. at 1996-2000. In *Guardians*, a disparate impact discrimination case, the Court was concerned that where a federal funds recipient "unintentionally" discriminates on the basis of race, the recipient may not be aware of its obligations under a voluntary Title VI program. *See* 463 U.S. 582 at 602, 103 S. Ct. 3221, 77 L. Ed. 2d 866. In *Franklin*, the Court stated that "the point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." 503 U.S. at 74. In *Gebser*, the Court rejected a damages remedy where there was no actual knowledge by school officials of the independent discriminatory acts of a teacher. While considerations regarding notice and the "contractual nature" of Spending Clause legislation apply to Title VI, Title IX, and § 504 cases, Title II compliance is not required only of recipients of federal funds. It bears repeating that the ADA was not enacted under the Spending Clause.

In light of the affirmative duties imposed by the ADA on state and local governments to accommodate the disabled, I also do not think that the purpose of Title II is frustrated by permitting damages where the discriminatory behavior resulted not from animus but from "bureaucratic inertia" or a "lack of knowledge and understanding of the law." As the legislative history demonstrates, Congress did not intend that complete relief would be available to a disabled individual denied access to public services only where it is shown that a public entity failed to make the required accommodations out of animus or bad-faith. Congress, the Supreme Court, and this circuit have recognized that discrimination against men and women with disabilities often results from thoughtlessness or a reluctance to employ the required resources to ensure accessibility, rather than from animus. *See Alexander v. Choate*, 469 U.S. 287, 295-298, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985) (discussion of Congressional intent behind § 504); *Smith v. Barton*, 914 F.2d 1330 (9th Cir. 1990).

Stating that there are "reasons to pause before too quickly extending even the first prong of *Guardians* to section 504, the Supreme Court noted:

> Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect.

*Alexander*, 469 U.S. at 295 (1985). This circuit has recognized that "it would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown." *Smith*, 914 F.2d at 1340.

As the government points out in its amicus brief, the "disparate treatment" and "disparate impact" labels borrowed from the Title VI jurisprudence do not adequately define the contours of disability discrimination. Congress found that intentional discrimination was only one of a variety of forms that disability discrimination takes. In Title II's statement of findings and purpose, Congress stated:

> Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failures to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs or other opportunities[.]

42 U.S.C. § 12101(5). To combat some of these unintentional discriminatory effects, Title II imposes affirmative obligations on public entities to make "reasonable modifications" in their policies and facilities to ensure that the deaf have effective and direct access to 911 emergency services. 28 C.F.R. § 35.161-62. A failure to make such reasonable accommodations results in discriminating against the disabled. In *Bartlett v. New York State Bd. of Law Examiners*, 970 F. Supp. 1094, 1149 (S.D.N.Y. 1997), the court held that

"intentional" discrimination occurred under section 504 where the defendants erred in deciding that the plaintiff was not disabled. The court stated:

> Intentional discrimination is shown by an intentional, or willful, violation of the Act itself. With this understood, it becomes clear, that while the defendants may have had the best of intentions, and while they may have believed themselves to be within the confines of the law, they nevertheless intentionally violated the ADA and the Rehabilitation Act by willfully withholding from the plaintiff the reasonable accommodations to which she was entitled under the law.

*Id.* at 1151 (emphasis added). In *Bartlett*, the violation was "intentional" because the defendants intentionally refused to make an accommodation requested by the plaintiff. The City's actions were no less problematic here, in light of the City's legal duty to provide deaf residents with effective access to 911 emergency services. In spite of its knowledge that such effective services were not being provided, the City refused to take corrective action until this action was filed. Here, the City was under a legal obligation not to impose a space bar requirement, but did so anyway. The City claims that it did not know that the "no space bar" requirement in the Department of Justice's (DOJ) Technical Assistance Manual was binding. Ignorance, however, should not excuse liability for compensatory damages that result from a municipality's violation of Title II. *See Owen v. City of Independence*, 445 U.S. 622, 654, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980) (no immunity under 42 U.S.C. § 1983 for good faith constitutional violations).[4] This violation of the ADA by the City is a sufficient basis to require it to compensate the

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[4] The City could have escaped Title II liability by showing that compliance with the DOJ regulations would have required a fundamental alteration in the nature of the 911 system, or imposed an undue financial or administrative burden on the City. *See* 28 C.F.R. § 35.150(a)(3). The City does not contend, however, that this exception applies.

plaintiffs for any damages that resulted from the City's Title II violations.

I am persuaded that proof of intentional discrimination on the basis of disability is not a prerequisite to the recovery of compensatory damages under Title II of the ADA. The majority's contrary holding, that a Title II plaintiff must prove discriminatory intent, erects a near-insurmountable wall against the recovery of compensatory damages under the ADA. I, therefore, respectfully dissent. I would reverse the district court's summary judgment in favor of the City, and remand for a trial on compensatory damages.[5]

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[5] I agree that the district court properly granted summary judgment to the Rodaboughs on the basis of qualified immunity.

# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

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No. CIV-95-0260-PHX-RCB

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WILLIAM D. FERGUSON, et al.,

*Plaintiffs,*

v.

CITY OF PHOENIX, et al.,

*Defendants.*

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Decided and Filed October 18, 1996

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## JUDGMENT

**Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that having this court granting Defendant City of Phoenix's motion for summary judgment and Defendant Rodabough's motion for summary judgment; judgment is hereby entered in favor of Plaintiffs on the issue of liability, for which a Consent Decree has already been entered June 25, 1996.

FURTHER ORDERED judgment is entered in favor of the Defendants on the issues of compensatory and punitive damages. This complaint and action are hereby dismissed.

DATED at Phoenix, Arizona, this 18th day of October, 1996.

RICHARD H. WEARE
Clerk of Court/DCE

By: /s/ M. Shon
Deputy Clerk

# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

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No. CIV 95-0260 PHX RCB

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WILLIAM D. FERGUSON, et al.,

*Plaintiffs,*

v.

CITY OF PHOENIX, et al.,

*Defendants.*

## ORDER

Before the court is defendant City of Phoenix's reasserted motion for summary judgment and defendant Rodabough's motion for summary judgment. Plaintiffs, in opposition to both motions, have filed cross-motions for summary judgment. Oral argument was heard on these matters on October 7, 1996. Also before the court is plaintiffs' motion to amend their complaint. Now, having carefully considered all of these issues, the court rules.

## FACTS

The underlying facts giving rise to this suit have already been elucidated in this court's Order of April 16, 1996. *See Ferguson v. City of Phoenix*, 931 F. Supp. 688 (D. Ariz. 1996). Familiarity with that Order is presumed.

## DISCUSSION

### I. Summary Judgment Standard.

To grant summary judgment, the court must determine that in the record before it there exists "no genuine issue as to any material fact" and, thus, "that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether to grant summary judgment, the court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. *Id.* at 248. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the nonmoving party. *Id.* A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial. *See id.* at 250. Finally, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant summary judgment. *See, e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

### II. The Legal Standards for Imposing Compensatory Damages.

As may come as no surprise to close followers of this case, the parties agree on little as it relates to this issue. Rather, both the proper legal standard and the relevant facts are hotly contested.

As an initial matter, the court notes that this question was first addressed by its April 16th Order. There the court held that

compensatory damages are a proper remedy for violations of both the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. There is, however, a qualification to this rule; "the plaintiff must allege intentional discrimination." *Tafoya v. Bobroff*, 865 F. Supp. 742, 750 (D.N.M. 1994). Thus, "[c]ompensatory damages are precluded in cases of unintentional discrimination, but are permissible on a showing of intentional discrimination." *Wood v. President and Trustees of Spring Hill College*, 978 F.2d 1214, 1219 (11th Cir. 1992). While this rule has widespread acceptance, *see, e.g., id.; Tafoya*, 865 F. Supp. at 749-50; *Tyler v. City of Manhattan*, 849 F. Supp. 1442, 1444 (D. Kan. 1994); *Miller v. Spicer*, 822 F. Supp. 158, 166-68 (D. Del. 1993); the Ninth Circuit has not specifically addressed the topic. With this in mind, plaintiffs assert that intentional conduct is not a prerequisite to compensatory damages, making a number of arguments in support of this conclusion.

First, plaintiff's note that the Department of Justice ("the Department") is statutorily authorized to interpret and enforce the ADA. 42 U.S.C. § 12134(a). In light of this, plaintiffs bring to the court's attention the Department's amicus brief filed in the pending Tenth Circuit appeal from *Tyler*. In it the Department argues that intent is not an element in the recovery of compensatory damages under the ADA. Plaintiffs argue, citing *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), that because of the Department's statutory authorization, the court should accord its position great weight.

When Congress has explicitly authorized an agency to promulgate regulations relating to a specific statute, "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* In other words *Chevron* applies when the asserted challenge is to the agency's statutorily authorized regulatory scheme. Here, the Department's amicus brief position relies upon neither its ADA regulations nor its published interpretations of them. To the contrary, the Department merely champions its own version of the proper

statutory construction and attendant legislative history governing the ADA. *Chevron*, therefore, does not control.

In addition, by filing an amicus brief and merely advocating a legal position, the Department has not acted pursuant to its statutory authority. There is nothing in the ADA that granted the Department the power to appear as amicus in all ADA cases as a matter of right. Rather, as happened in this case, the Department must still seek the permission of the court in order to participate. Thus, the Department's position, as propounded in its brief in *Tyler*, does not have the presumptive weight that plaintiffs advocate.

Plaintiffs next argue that neither discrimination claims based on disparate impact nor the failure to make reasonable accommodation for one's disability require a showing of intent. While the cases plaintiffs cite accurately reflect that this is the state of the law as to liability, they simply do not address the level of proof required for compensatory damages. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983); *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996); *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, - - U.S. - -, 114 S. Ct. 2726 (1994); *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988); *GLAD v. Zolin*, 812 F.2d 1103 (9th Cir. 1987). Yet the motions before the court deal with the latter question. Whether there has been a violation of the ADA is no longer the issue.

Finally, relying upon the maxim inclusio unius est exclusio alterius, plaintiffs argue that because intent is not expressed as an element in Title II of the ADA but is required under Title I, intent is not an element in this Title II case. Perhaps, were this a case of first impression, such an argument might have some appeal. However, the weight of authority has found that intentional discrimination is a necessary element to the recovery of compensatory damages. In fact, plaintiffs have cited no case law that reaches a contrary conclusion.

Having once again determined that intentional conduct is necessary for plaintiffs to recover compensatory damages under

either the ADA or the Rehabilitation Act, the court now moves to the arduous task of examining the factual record in this case. However, before doing so the court feels compelled to address the level of proof necessary to demonstrate intentional conduct. Although the parties themselves only obliquely address this point, they actually appear to agree on the relevant standard to apply.

Plaintiffs argue that the evidence "reflects a reckless or callous disregard of, and/or deliberate indifference to Plaintiffs' federally protected rights." (Resp. and Cross-motion at 15.) (emphasis added) For their part, defendants argue there is no evidence that they "acted with discriminatory animus or deliberate indifference." (Reply and Resp. at 7.) (emphasis added) Thus, the court will examine the record for evidence that defendants were at least deliberately indifferent to the strong likelihood that their action or inaction was violating plaintiffs' federally protected rights.

The Supreme Court has recently examined the meaning of "deliberate indifference," albeit in the context of an asserted Eighth Amendment violation. *See Farmer v. Brennan*, - - U.S. - -, 114 S. Ct. 1970 (1994). There the Court noted that because "deliberate indifference [lies] somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness." *Id.* at 1978 (footnote omitted). However, because recklessness itself is not self defining, the Court then defined recklessness. In civil cases the law applies, what the court termed, an "objective test." That is to say, a person is reckless if he or she "acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that either is known or so obvious that it should be known." *Id.*

This is a civil case. Thus, it is the "objective test" for deliberate indifference that this court shall apply to the record before it.

**III. The Evidence Against Defendants.**

Plaintiffs argue that intent is established by three different sets of facts: (1) that defendants ignored the requirements of the

Department's Technical Assistance Manual ("the Manual") despite the Department's warnings; (2) that defendants failed to follow the clear requirements of the law; and (3) that defendants ignored TDD access complaints.

**(1) Warnings About ADA Requirements.**

The first warning plaintiffs believe that defendants failed to heed emanates from the ADA itself; "the statutes and regulations put the Defendants on notice as to the publication of the DOJ Technical Assistance Manual." (Resp. and Cross-motion at 13.) However, mere notice of the Manual, in the absence of knowledge that the Manual has the force and effect of law, is not a failure to act in the face of an unjustifiably high risk of harm. *Ferguson*, 931 F. Supp. at 697 (Absent "explicit notice that the Manual had the force of law or that the City did not have a good faith belief that the Manual did not have the force and effect of law, the City cannot be held to have acted intentionally or with deliberate indifference to plaintiff's rights.")

Plaintiffs next cite to the Department's August 3, 1994, letter to former Mayor Paul Johnson, in which it advised him of the Department's settlement agreement with the City of Los Angeles. The letter also enclosed a copy of the settlement agreement and several pages of "most frequently asked questions" concerning 911 service and the ADA's requirements.

The court has already addressed the inferences (or lack thereof) that can properly be drawn from this letter. *Id.* at 697. The only new information with respect to this letter is evidence of its routing to Cheryl Sculley, a high level person at the City Manager's office. In addition, the letter's accompanying routing slip provided that "Phx must also provide these [911 services] under Title II of the ADA." However, neither this routing nor the slip's recognition that the City was bound by the requirements of the ADA cures the basic problem that the court found when confronted solely with the letter; there is still the absence of "an inference that the City knew what the Department's interpretive Manual required in August of 1994, and yet chose to continue its space bar policy." *Id.*

Nevertheless, plaintiffs note that regardless of the space bar policy, the letter informed defendants that the ADA required them to undertake a self evaluation of their 911 TDD access. Plaintiffs assert that despite this notice defendants deliberately failed to do so. The record, however, shows otherwise.

Commander Rodabough responded to plaintiff Ferguson's 911 access complaint on September 1, 1994, less than one month after the City received the Department's letter. In his response was the following passage:

> All of the operators who received calls acted appropriately within the guidelines of the existing system. However, in an attempt to better serve our customers, *we have evaluated the current system and the level of service which we provide to the hearing impaired.* We are also dissatisfied with the quality of service available within the current system. We are now in the process of exploring other options which we hope will allow us to improve service in this area.

(PSOF Ex. KK) (emphasis added)

Commander Rodabough then elaborated on this passage during this deposition.

> Q: [by Mr. Haglund]: It says—there's the sentence that says or clause that "we have evaluated the current system and the level of service which we provide to the hearing impaired."
>
> Can you tell me what you're referring to? Is there a specific evaluation that you conducted or the department conducted?
>
> A: As I investigated this complaint I looked at the findings, I sat down with my staff to see what was happening and what occurred. And at this particular time, we were just coming up with a new phone system and a new computer system and we had done enormous

amounts of training to try and just keep our whole system up and functioning.

Our computer system that we have picked up really had problems. And we were continually taking it down, rewriting, making changes and they've been inundated with training to try and keep the whole 9-1-1 system, Crime stop system working.

I looked at the way things had been done and what I saw was a big chance for an error, a human error. I've been involved in training for many years. My degree is Bachelor of Science Degree in law enforcement education from Brigham Young University.

I worked at the training, regional training academy as the in-service sergeant for all of the police department for two years. I'm certified through Arizona POST. I've done a lot of training; specialty units everything from SWAT teams to detective to patrol to you-name-it.

What I was concerned about was the fact that we were relying on a wide variety of people with skills and experience to identify a tone and one of the things that is happening is we're getting a lot of other tones and things and garbage in our system, fax systems dialing in that we didn't use to have years ago.

I felt that no matter what level of training we put on it, we have the human-error factor that I wanted to get away. I wanted to see if we could find a better way of delivering service than depending upon the human error to catch a tone with background noises and other things that are going on, other devices calling in.

Some connections being poor depending on the phone connections. Some of the lines that come in from parts of the city are cleaner than others. I wanted to see if we could improve that.

> At this point, we evaluated our training, what we could immediately do. But I said there's got to be a better way to do this than we're currently doing. And I was dissatisfied with the level of service. I felt like the human error to identify that tone —I probably have 140 employees who could answer that phone on different shifts with varying levels of experience.
>
> With the number of calls we get in, they hear it so infrequently, we could have employees that, under real situations, may not hear that tone for two or three years. Now, they'd hear it in training, but to keep that with people moving from shift to shift, I felt like the human error of identifying that was great.
>
> So I set about trying to find the best system we could to try and improve our system. I also got in touch with U.S. West to see if we could improve and if they were aware of anything. I also contacted our computer services bureau which is headed up by Joe Hindman to see what they could find for us, what was available out there, what we could do to improve our system.
>
> This paragraph is a response to my impressions and what we were trying to do.

(PSOF Ex. PP at 35-37.)

As the foregoing makes clear, there was an internal self investigation into the level of 911 service the City provided to TDD users. Indeed, not only is there no evidence of deliberate indifference in this regard, but rather, the evidence shows a diligent effort on the part of defendants to upgrade their 911 system.

Plaintiffs cite to two other incidents as evidence that the City was on notice of the ADA's requirements. The first is the April 21, 1995, mailings of the DOJ approved E.A.S.E. training packet to Mayor Skip Rimsza and to Arizona Department of Public Safety Director Tom Recker. However, while this packet offered TDD

training and advised that silent calls should be considered potential TDD calls, what it did not do was advise the City that its current training system was inadequate under the law, that the Manual prohibited a space bar requirement, or most importantly, that the Manual has the presumptive effect of law. This mailing cannot, therefore, logically serve as evidence that the city was deliberately indifferent to the requirements of the Manual.

Finally, plaintiffs cite to a June 1995 National Emergency Numbers Association ("NENA") Convention attended by Commander Rodabough. At this convention Robert Mather, the Department's attorney in this case, addressed the attendees and advised them of both the problems and experiences of 911 TDD access in Oregon and Los Angeles, including the problems associated with transferring TDD calls to other TDD capable positions. Again, there is no specific mention or evaluation of the system then employed by the City, that the Mutual prohibited a space bar requirement, or that the Manual had the presumptive effect of law. For these reasons, this evidence also fails to provide an inference of deliberate indifference on the part of defendants.

**(2) 911 Access Requirements Imposed by Law.**

Plaintiffs, citing to the Rehabilitation Act, the ADA, the Department's regulations and the Manual, argue that these four documents "have not been kept secret," that defendants knew of their requirements through a variety of sources (including the ones addressed above), and that, despite this knowledge, "[u]ntil entry of the Consent Decree, Phoenix simply refused to comply with any of [their] requirements." (Resp. and Cross-motion at 16.)

The court need not re-address the previous examples of "notice" proffered by plaintiffs. For the reasons already stated this evidence does not support an inference of deliberate indifferenee. Moreover, plaintiffs further evidence of notice is equally unavailing.

First, plaintiffs' cite to a May 1990 NENA article which informs the reader that incoming TDD calls can take the form of a silent call. They argue that this article put defendants on notice

because as NENA members Commander Rodabough and other City officials received a copy of it. Putting aside defendants evidentiary objections, this article in no way creates an inference that the city was deliberately indifferent to the requirements of the ADA. First, there is no evidence that anyone from the City read this article. Moreover, even if they had, again there is no mention of either the Manual or its no space bar requirement. Finally, as pointed out by defendants, this article recommends TDD detectors as a means of solving the silent call problem, a solution the City actually tried but found unsuccessful.

Plaintiffs next cite to Maricopa Association of Governments ("MAG") committee meeting minutes as evidence of notice. Defendants again make evidentiary objections. However, again these objections need not detain the analysis, for a review of this evidence fails to show any mention of either the Manual or its no space bar requirement. Rather, these minutes evince discussions concerning the need for adequate TDD training for 911 operators. The court, however, has never addressed the adequacy of defendants' 911 operator training. To the contrary, a review of the April Order shows that the court's analysis rested solely on the legal effect of the Manual. *See Ferguson*, 931 F. Supp. at 694-96.

Moreover, even were defendants' training suspect, these various meeting minutes do not address the adequacy (or inadequacy) of defendants' TDD training program. In other words, they do not put defendants on notice that their training program violated the requirements of the ADA.

Finally, plaintiffs cite to ADA compliance information Professor Tucker faxed to defendants' counsel during the course of this litigation. This fax included reference to the Manual and its no space bar requirement. However, there still was no reference to the Manual's binding legal effect. In addition, by the time defendants received this information, this litigation was well underway. Indeed, shortly after this fax Professor Tucker became a plaintiff in this action. Notice of the Manual and its requirements under these circumstances does not evince deliberate indifference, for by this

time defendants were legitimately attempting to defend this lawsuit. As counsel's argument on the previous motion for summary judgment makes clear, defendants had a good faith (if ultimately erroneous) belief that the Manual was nothing more than a non-binding guideline. As this fax did nothing to dissuade such a belief, it does not evince deliberate indifference.

**(3) Complaints About 911 TDD Access.**

Finally, plaintiffs argue that the City has ignored repeated complaints concerning 911 TDD access. In support it cites the affidavit of Kathie Nelson, the former 911-TDD trainer for the Arizona Council for the Hearing Impaired ("ACHI"), a state agency. She averred to receiving "sporadic" complaints concerning 911 access, but was unable to recall how many of these dealt specifically with Phoenix 911. Nevertheless, she did remember "calling Margaret Dixon, of the Phoenix 9-1-1 center, on more than one occasion to report concerns about 9-1-1/TDD problems prior to August 1994." (PSOF ex. HH at ¶ 6.) However, contrary to plaintiffs' assertion that defendants ignored these complaints, she also averred that "[o]n follow-up calls to Phoenix 9-1-1 center, I would be told that the tapes were being listened to or that the tapes were being pulled for review. To my knowledge, there was always follow-up done by the Phoenix 9-1-1 center." *Id.* at ¶ 7.)

Plaintiffs also cite to an August 1994 ACHI workshops attended by Phoenix 911 supervisor Carol Fisher. Fisher spoke at these workshops and, apparently, had specific 911 problems brought to her attention. Plaintiffs argue that despite this, Fisher took no action in response and that, as a result, Kathie Nelson wrote a letter to Margaret Dixon to inform her of these problems. However, the problems to which plaintiffs refer are, in fact, the very problems that gave rise to this suit. That is to say, both Fisher and Dixon were appraised of Ferguson's August 1994 problems with 911. These problems were the very ones which prompted his formal citizen's complaint and the subsequent response from Commander Rodabough. As the court has already noted in examining that response, the City did endeavor to improve its 911 TDD access.

While these changes never did away with the space bar requirement, as the court has already explained, there is no evidence that the City knew such a requirement had the force of law. Because this evidence does not alter that conclusion it does not support an inference of deliberate indifference.

Plaintiffs also cite to the experiences and complaints of the other plaintiffs in this lawsuit. However, these problems all happened after Ferguson's problems, which means they all occurred after the City began trying to improve its 911 TDD access. In other words, by the time the other plaintiffs encountered their problems, the City had undertaken a good faith effort to upgrade their system. "As a general matter, good faith attempts to pursue legitimate ends are not sufficient to support an award of compensatory damages under section 504" of the Rehabilitation Act. *Wood*, 978 F.2d at 1219. Furthermore, because "[t]he legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA," *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995), the same holds true for the ADA as well. *See Hoekstra v. Independent Sch. Dist. No. 283*, 916 F. Supp. 941, 949 (D. Minn. 1996) ("Good faith attempts to pursue legitimate ends, such as safety, will not result in liability under the ADA.").

In sum, the evidence presented by plaintiffs does not show that defendants either knew of the Manual's no space bar requirement or that the Manual had the presumptive effect of law. Nor does the evidence allow for an inference that defendants' should have known of these things and yet unjustifiably turned a blind eye. To the contrary, the evidence shows that defendants acted both promptly and in good faith in attempting to upgrade their 911 service. Therefore, absent evidence of defendants' deliberate indifference, plaintiffs' are not entitled to compensatory (or for that matter punitive) damages.

**IV. Qualified Immunity.**

As the previous analysis makes clear, because there is no evidence of deliberate indifference on the part of Commander Rodabough, plaintiffs' cannot recover against him. However, in addition, the court notes that Commander Rodabough is entitled to qualified immunity.

Qualified immunity is a two part inquiry: "1) Was the law governing the officials conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Act Up/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). Here, the court need go no further than the first inquiry. Both plaintiffs and the Department represented to the court, in urging publication of its April Order, that this case is the first in the country to give binding legal effect to the Manual. In light of this fact, it is clear that the law governing Commander Rodabough's conduct prior to that Order was not "clearly established." *Id.* Needless to say, this means that Commander Rodabough is entitled to qualified immunity.

**V. Motion to Amend the Complaint.**

Plaintiffs seek to amend their complaint so as to more fully perfect their allegations against Commander Rodabough. However, in light of the analysis in this Order, it appears that such an amendment would be futile. Plaintiffs' motion, therefore, is denied.

IT IS ORDERED granting defendant City's motion for summary judgment (doc. 169).

IT IS FURTHER ORDERED granting defendant Rodabough's motion for summary judgment (doc. 170).

IT IS FURTHER ORDERED denying plaintiffs' motion to amend the complaint (doc. 195).

IT IS FURTHER ORDERED denying plaintiffs' cross-motion for summary judgment (docs. 216 & 219). The Clerk is directed to enter judgment for plaintiffs on the issue of liability, for which a Consent Decree has already been entered on June 25, 1996.

However, the Clerk is further directed to enter judgment for defendants on the issues of compensatory and punitive damages. This order is a final judgment and terminates this case.

DATED this 16th day of October, 1996.

/s/ Robert C. Broomfield
Robert C. Broomfield
United States District Judge

# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

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NO. CIV 95-0260-PHX-RCB
NO. CIV 95-2742-PHX-RCB
NO. CIV 96-0305-PHX-RCB
(consolidated)

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WILLIAM D. FERGUSON, et al.,

*Plaintiffs,*

v.

CITY OF PHOENIX, et al.,

*Defendant.*

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Decided June 24, 1996

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Filed June 25, 1996

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## CONSENT ORDER

### I. Introduction

1. These three suits (now consolidated) were brought by William and Elizabeth Ferguson, Bonnie Tucker, Jay Frankel, and Barbara Jean Coffman ("Plaintiffs") against the City of Phoenix

under the provisions of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134, the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, and 42 U.S.C. § 1983. In their complaints, plaintiffs allege, *inter alia*, that the City of Phoenix, Arizona ("the City") discriminated against them on the basis of disability (hearing impairments) by operating its emergency 9-1-1 system in a manner that failed to respond properly to callers using a telecommunications device for the deaf ("TDD").

2. On April 12, 1996, this Court issued an Order denying the City's motion for summary judgment. In doing so, the Court accepted as "reasonable" the Department of Justice's interpretation of the title II requirements for 9-1-1 systems to handle calls from TDD users, as set forth in the Department's Title II Technical Assistance Manual (II-7.3100):

> Additional dialing or space bar requirements are not permitted. Operators should be trained to recognize incoming TDD signals and respond appropriately. In addition, they also must be trained to recognize that "silent" calls may be TDD or computer modem calls and to respond appropriately to such calls as well.

The City's 9-1-1 system in the past has required the transmission of tones, emitted by pressing a TDD space bar, in order to respond via TDD, both with the manual transfer system in place before August 21, 1995, and with the automatic diverter system in place thereafter. Order at 3-4. The Court recognized, however, that "not all TDDs emit an audible tone when the space bar is pressed." Order at 15. Accordingly, the Court found that "[F]or no tone users, the City's space bar requirement fails to provide them with [the] same 9-1-1 access afforded other TDD users, let alone the non-hearing impaired public." Order at 15. The Court used the same analysis with respect to the City's motion for summary judgment on the Rehabilitation Act claim. Order at 17-18.

3. The Court in its April 12, 1996, Order did not determine whether it would create an undue financial or administrative burden

for the City to alter its 9-1-1 system to eliminate the space bar requirement and, accordingly, reached no conclusion as to liability. The parties have agreed to forego litigation of that question with respect to claims for injunctive relief and hereby waive a hearing and findings of fact and conclusions of law on the issues of liability with respect to claims for injunctive relief, and further agree to the entry of this Order as final and binding among themselves as to the issue of injunctive relief.

4. This Order does not constitute an adjudication or finding on liability, nor shall it be construed as an admission by the City or a finding of wrongdoing or violation of any applicable Federal law or regulation.

**II. Role of the United States.**

5. The United States sought and was granted leave to participate as amicus curiae in these actions. The U.S. Attorney General has enforcement responsibilities under title II of the ADA and Section 504 of the Rehabilitation Act, including the authority to bring suit to enforce these statutes.

6. The parties to these actions and the United States now agree that the United States, because of its enforcement authority and interest in these cases, is so situated that disposition of the cases in the United States' absence may leave the City subject to the risk of incurring inconsistent obligations. Accordingly, the parties and the United States agree that the United States should be joined as a party under Fed. R. Civ. P. 19(a)(2)(ii) for the limited purpose of this Consent Order relating to injunctive relief. It is so ORDERED.

7. The United States agrees that the City's full implementation of the injunctive provisions set forth below will meet the City's obligations under title II of the ADA and Section 504 of the Rehabilitation Act with respect to providing effective communication for TDD users seeking access to the City's 9-1-1 system.

**III. Injunctive Relief**

It is hereby ORDERED ADJUDGED AND DECREED as follows:

8. Technology. In order to provide individuals who use TDDs with direct access to the City's 9-1-1 services, the City shall, within sixty (60) days of the date of this Order:

a. Install appropriate TDD 9-1-1 technology at each answering position.

b. Acquire additional TDD 9-1-1 equipment, or equivalent, to ensure that backup equipment will be provided in case of an emergency or TDD malfunction.

c. Evaluate its 9-1-1 system and procedures regarding the processing of TDD calls that request police, fire or emergency medical services, and modify the existing system and the procedures in order to ensure effective call handling. This may include the transferring and/or conferencing of TDD calls with the Police, Fire or Emergency Medical Services.

d. Include TDD 9-1-1 equipment in power failure contingency plans.

e. Record TDD calls electronically in the same manner as voice telephone calls.

9. Policies, Practices, and Procedures. In order to ensure effective processing of TDD calls, the City shall, within sixty (60) days of the date of this Order, establish and implement policies, practices and procedures to ensure that:

a. All 9-1-1 call-takers recognize incoming TDD tones and/ or voice recorded announcements and respond appropriately via TDD; that

b. All 9-1-1 call-takers consider "silent" open lines as potential TDD calls and respond accordingly; and that

c. All policies, practices and procedures requiring TDD callers to press a space bar are eliminated.

The policies and procedures shall be incorporated into the City's Standard Operating Procedures and training materials.

10. Training. In order to ensure the proper operation of TDDs and related equipment, as well as the effective processing of TDD calls by 9-1-1 call-takers, the City shall provide comprehensive training for all 9-1-1 call-takers. The City has provided training to all current call-takers and shall provide such training for newly hired call-takers. The comprehensive training shall include:

a. General information about title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act;

b. General information about communication issues regarding individuals who are deaf or hard of hearing, or who have speech impairments, including information about American Sign Language; and

c. Practical instruction on identifying and processing of TDD calls, including the importance of using proper syntax and protocol when responding to TDD calls and relayed calls.

In addition to the above, all new employees do and shall receive hands-on training in TDD communications as part of their initial training orientation. The comprehensive and hands-on training for 9-1-1 call-takers shall take place before a call-taker handles calls alone.

The City shall also provide refresher training for each call-taker every six months from the date of this Order in order to maintain each call-taker's skill levels.

11. Competency Tests. To insure the effectiveness of its training, the City shall

a. Utilize the Telecommunications for the Deaf, Inc.'s Emergency Access Self-Evaluation program or its equivalent to establish criteria and test each trainee's competency at the conclusion of the training;

b. Develop and implement a supplemental training plan for any 9-1-1 call-taker who does not satisfactorily complete the required training;

c. Provide a refresher training course for each call-taker every six (6) months from the date of this Order in order to maintain call-takers' skill levels;

d. Re-evaluate any 9-1-1 call-taker's skill after any incident involving unsatisfactory processing of a TDD call;

e. Document all training provided, including each 9-1-1 call-taker's employee number, title and the date of training; and

f. Provide copies of the documentation to Plaintiffs and/or the United States upon request.

The City recently has developed and implemented various materials to establish criteria and to test each new employee's competency at the conclusion of training, and has developed and implemented a training program designed to satisfy the requirements of subparts a - f.

12. Public Education. Within sixty (60) days of the date of this Order, the City shall begin working directly with organizations representing persons who are hearing or speech impaired, to develop and implement a public education program to promote the use of 9-1-1 services by individuals who use TDDs.

13. Testing and Audit. Beginning ninety (90) days after the date of this Order, the City shall, on a quarterly basis, conduct test calls on each shift to call-taking positions as routed by the Automatic Call Distributor ("ACD"). These tests shall be unannounced and

shall be documented to include the date and time of the test, the call-taker position, the identification of the call as "silent," transmitting tones or a voice-recorded announcement and whether the call was processed properly and efficiently according to departmental policies and training directives. Counsel for the Plaintiffs, Counsel for the United States, and the City shall work toward developing a mutually agreeable plan to ensure an objective and effective test program.

If testing reveals inadequacies in the handling of TDD calls, the City shall take immediate remedial action that may include as appropriate: additional training and evaluation, equipment changes, additional policy or procedural changes, and disciplinary action. Upon request, the City shall provide copies of the documentation to Plaintiffs and/or the United States.

14. On-Site Evaluation. Within ninety (90) days after the effective date of this Order, the City shall permit counsel for the Plaintiffs and counsel for the United States, along with a technical advisor, Toni D. Dunne, at the United States' expense, to conduct an on-site evaluation. This evaluation will be conducted to determine the effectiveness of TDD access to Phoenix's 9-1-1 services as a whole, including training, and practices, policies, and procedures. If, as a result of this evaluation, the United States or Plaintiffs believe there are deficiencies in Phoenix's 9-1-1 system, counsel for the United States, for the Plaintiffs, and for the City shall meet and attempt to reach an agreement on remedying any deficiencies identified. If no such agreement is reached within thirty (30) days, the United States, the Plaintiffs, or the City may bring the issue to the Court for resolution.

## IV. Implementation of the Order

It is further ORDERED that:

15. Progress Report. Within sixty (60) days of the effective date of this Order, the City shall submit its first report to counsel for Plaintiffs and for the United States detailing the actions it has taken to comply with this Order. Within one hundred-twenty (120) days of

the date of this Order, the City shall submit its second report to counsel for Plaintiffs and the United States detailing the actions it has taken to comply with this Order.

16. Audit Reports. During the two year period following the effective date of this Order, results from each round of tests required by paragraph 13 shall be summarized and sent to Plaintiffs and the United States on a semi-annual basis along with a description of any actions taken to remedy inadequacies uncovered by the tests.

17. Final Report. The City shall provide a final report to Plaintiffs and the United States forty-five (45) days prior to the expiration date of the Order, detailing the actions taken to comply with this Order and describing any actions taken to remedy inadequacies uncovered by tests.

18. Records. The City shall retain during the life of this Consent Order records necessary to document the implementation of and continued compliance with this Order and shall allow the United States and Plaintiffs to review and copy such records upon reasonable notice.

19. Resolution of Disputes. The parties and the United States shall attempt to resolve informally any disputes that may occur under this Consent Order. If the parties and the United States are unable to reach agreement to resolve a dispute within thirty (30) days after the issue has been raised, the dispute may be submitted to the Court for resolution.

20. Jurisdiction. The Court shall retain jurisdiction over this Consent Order for the purposes of enforcing this Order, resolving any disputes that may arise under this Order and entering such further orders as may be appropriate.

21. Termination. This Order shall terminate two (2) years from the date of its entry unless the Court finds good cause to extend any provision herein.

It is so ORDERED, this 24th day of June, 1996.

/s/ Robert C. Broomfield
ROBERT C. BROOMFIELD
United States District Judge

Agreed and Consented To:

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# UNITED STATES DISTRICT COURT
# FOR THE DISTRICT OF ARIZONA

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No. CIV 95-0260 PHX RCB

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WILLIAM FERGUSON, et al.,

*Plaintiffs,*

vs.

CITY OF PHOENIX,

*Defendant.*

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Filed April 16, 1996

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## OPINION OF THE COURT

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BROOMFIELD, *Chief Judge.*

Plaintiffs, William Ferguson, Bonnie Tucker and Jay Frankel, bring this case pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, the Rehabilitation Act, 29 U.S.C. § 794(a), and 42 U.S.C. § 1983. Each plaintiff is deaf, and thereby qualifies for ADA protection. Plaintiffs allege that defendant, the City of Phoenix, operates its 911 emergency service in such a way as to discriminate against the hearing impaired, in violation of the ADA. Now before the court is defendant's motion for summary judgment. The United States Department of Justice has been permitted to appear as amicus curiae. Having read the parties briefs and heard oral argument, the court now rules.

### FACTS

**A. Background.**

All plaintiffs in this case have attempted to communicate with the Phoenix 911 system through a telecommunications device for the deaf ("TDD" or "TTY"). A TDD is the standard instrument used by hearing impaired individuals who wish to communicate via the telephone. It is similar to conversing by electronic mail or modem. In order to communicate, both parties must have TDD technology. A TDD caller types in his half of the conversation, which is then transmitted over the phone line and read by the recipient on a display on his TDD. During a conversation only one person can talk at a time because the phone lines can only transit TDD messages one at a time. This makes TDD conversations slower than verbal

communication. As a result, a "TDD protocol" has been erected within the deaf community. (United States Br. at 6.) Apparently, "just as a hearing person will dial a telephone number and wait to hear a person answer with a greeting before proceeding to speak, a TDD caller will dial a telephone number and wait for the person receiving the call to type a greeting and the 'GA' (go ahead) before beginning to converse in text. The TDD user does not typically press keys while awaiting a response to his or her call. Pressing keys at this time would not be considered common practice among TDD users. It is an additional step that could be considered 'foreign' TDD protocol." (Aff. of Toni D. Dunne at 4, United States Br. Ex. A.)

Some, but not all, TDDs emit an audible "tone" that signals properly trained hearing individuals that the call they have received is a TDD call. Other TDDs have a "TDD announcer" instead of the "tone" feature. The TDD announcer transmits an actual voice recording that informs the other party that they have received a TDD call.

**B. Phoenix's 911 System and TDD Calls.**

During the relevant time frame for this suit Phoenix had two separate systems for handling 911 calls placed via TDD. The first was in place before August 21, 1995. Essentially, a TDD call would ring into 911 just like any other call and would be verbally answered by a 911 operator. That call would then be transferred to the one TDD machine located at an auxiliary answering position. This transfer, which occurred manually, required a) the TDD caller to initiate the audible tone, and b) the operator to recognize that tone and transfer the call. In other words, to get the operator to manually transfer the call the TDD caller had to emit the audible tone.

Even after emitting the tone, no typed instructions were given to a TDD caller informing the caller that the call was being transferred or otherwise handled. Once the transfer was completed, the system automatically transmitted the typed message "Phoenix police department, give us your name address and phone number, how can we help you?" This is the same message that is currently

transmitted under the City's new 911 system. Normally, however, "all TTY dialogue uses abbreviations[,] and punctuations are not used." (Aff. of Alfred Sonnestrahl P 52, PSOF Ex. D.) Again, this is due to the relatively slow speed of TDD communications.

On August 21, 1995, the City implemented its current, upgraded system for handling 911 TDD calls. Now two of the 30 answering booths are equipped with TDD technology. In addition, an automatic diverter system was installed. This system monitors all incoming 911 calls and, if a TDD audible tone is detected, automatically transfers the call to one of the positions equipped with TDD technology. Thus, for this transfer to take place the caller must still initiate the TDD audible tone.

If the system detects a TDD call when all 911 operators are otherwise busy, a message is automatically sent to the caller telling him that he has reached 911 and should remain on the line. That TDD call is then placed in front of all other holding calls. Once freed to handle the call, the 911 operator gets the verbal message "TDD call." This message is repeated until the operator manually transfers the call to a TDD equipped position.

Under either the new or old system, operators receiving silent calls treated these calls as "911 hangups." Under established procedure, operators would hangup on a silent call and then call the caller back on a regular voice phone line. However, according to defendant, "in September of 1995, the City implemented a new procedure whereby an operator who receives a silent call can press '5#' and automatically send a message to a potential TDD caller to press the space bar. If the silent caller is on a TDD, he can then press the space bar and emit the Baudot tone, signaling the diverter to automatically connect to the TDD station." (Def.'s Reply at 6.)

**C. Plaintiffs' Experiences with 911.**

In the early morning hours of August 14, 1994, plaintiff Ferguson observed some suspicious looking individuals lurking about the front of his home. He decided to call 911 and report these people to the Phoenix police using his TDD. The 911 operator who

answered Ferguson's call, hearing no audible tone or response, hung up, in accordance with defendant's official policy on "silent calls." Also in accordance with that policy, the operator immediately attempted to call Ferguson back. However, the line was busy. That was because, in the interim, Ferguson had placed a second call to 911. The operator who answered the second call heard an audible tone that she recognized as a TDD signal. As a result, she transferred the call to a different operator station, one equipped with a TDD machine. This transfer took 30 seconds to effectuate. Once the call was transferred the operator sent a preprogrammed TDD message to Ferguson. However, that call also was disconnected. Having been disconnected, the operator, pursuant to official policy, dispatched the police to plaintiff's home on a priority two check welfare call. Based upon plaintiff's actual circumstances, however, the police should have been dispatched to Ferguson's residence on a priority one call. Yet, because of the disconnects, plaintiff was unable to communicate the true nature of his emergency.

While the police were en route, Ferguson called 911 twice more. Both calls were answered and subsequently disconnected, despite Ferguson causing his TDD to make the audible tone. Meanwhile, the individuals broke into plaintiff's truck. Having gotten no satisfaction from 911, Ferguson unsuccessfully attempted to thwart the thieves himself.

On January 30, 1995, Ferguson again called 911, this time to report ongoing vandalism on his property. As had happened before, the 911 operator hung up on his call. Ferguson tried calling back. Meanwhile, the operator called Ferguson back but received a busy signal. As a result, she asked US West to break through the line. When the US West operator got no response, the 911 operator again sent the police to Ferguson's home on a priority two basis. As these goings on were unbeknownst to Ferguson, he tried reaching 911 three more times, each time emitting the TDD audible tone. It was only on his fourth attempt that Ferguson was connected to a 911 operator with TDD equipment. Apparently, the three previous

operators had failed to recognize the TDD audible tone and, as a result, disconnected these otherwise "silent calls."

On August 28, 1995, Ferguson observed a prowler lurking behind his neighbor's garage. He called 911 as a result. This call was handled under the new 911 system. However, the 911 operator again disconnected his call. This futile process was then repeated. Ferguson then made a third call to 911. After a few minutes delay, he was connected to a TDD operator. However, during the course of that call, Ferguson experienced delays lasting several minutes, during which time he was unable to communicate with the 911 operator.

As a result of these experiences, Ferguson complained on a number of occasions to the City about its 911 service. These various complaints were reviewed by Commander Lyle Rodabough. He acknowledged plaintiff's troubles, expressed his dissatisfaction with the way plaintiff was treated by the system, and vowed corrective action.

On November 25, 1995, plaintiff Tucker called 911 via her TDD. She did so to test the system because her father, who is also deaf, had unsuccessfully tried to reach 911 earlier that evening when he believed he was experiencing a medical emergency. Her first call went unrecognized as a TDD call. On her second call she communicated the purpose of her call to the 911 operator. The operator suggested Tucker hang up and again try to test the system. Tucker then placed three more calls to 911. The first two received no response after 2.5 and 3 minutes on the line, respectively. This, despite Tucker's emission of the TDD audible tone. On the third call the TDD tone was properly recognized.

On December 30, 1995, plaintiff Frankel called 911 to report a theft. His TDD, instead of emitting an audible tone, transmits an actual voice message alerting the other party that his is a TDD call. Despite this verbal announcement, each of his five calls to 911 were disconnected by the various 911 operators who answered his calls.

# DISCUSSION

## I. Summary Judgment Standard.

To grant summary judgment, the court must determine that in the record before it there exists "no genuine issue as to any material fact" and, thus, "that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether to grant summary judgment, the court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. *Id.* at 248. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the nonmoving party. *Id.* A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial. *See id.* at 250. Finally, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant summary judgment. *See, e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006, 98 L. Ed. 2d 650, 108 S. Ct. 698 (1988).

## II. Requirements of the ADA.

Congress, finding among other things that "individuals with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of . . . communication barriers . . . [and the] failure to make modifications to existing facilities and practices," enacted the ADA. 42 U.S.C. § 12101.

Section 202 of Title II of the ADA provides, in relevant part, that "no qualified individual with a disability shall, by reason of such disability . . . be denied the benefits of the services . . . of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

In enacting this statute, Congress specifically authorized the Attorney General to promulgate all regulations necessary to implement Title II. 42 U.S.C. § 12134(a). Pursuant to this statutory mandate, the Department of Justice ("the Department") issued regulations that are codified in volume 28 of the Code of Federal Regulations. The overriding concern of those regulations relevant to this case is that a public entity's communications with its hearing impaired citizens be "as effective as [its] communications with others." 28 C.F.R. § 35.160. Thus, public entities that offer 911 emergency service must also provide individuals who use TDDs "direct access" to that service.[1] 28 C.F.R. § 35.162. This means that "TDDs or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech." 28 C.F.R. § 35.161. Thus, the regulations require that public entities "take appropriate steps, including equipping their emergency systems with modern technology, as may be necessary to promptly receive and respond to a call from users of TDDs and computer modems." 28 C.F.R. § 35.162, App. A at 471. The Department determines compliance by examining the performance of a particular 911 service. *Id.*

Also pursuant to statutory mandate, the Department promulgated the Title II Technical Assistance Manual ("Manual"), to aid in understanding the rights and obligations created by the ADA and its attendant regulations. *See* 42 U.S.C. § 12206(c)(3). The

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[1] "'Direct access' means that emergency telephone services can directly receive calls from TDDs and computer modem users without relying on outside relay services or third party services." Department of Justice Title II Technical Assistance Manual II-7.3100 at 41.

Manual, interpreting the Department's ADA regulations outlined above, elaborates on the requirements of Title II in the 911 context:

> Are any additional dialing or space bar requirements permissible for 911 systems? No. Additional dialing or space bar requirements are not permitted. Operators should be trained to recognize incoming TDD signals and respond appropriately. In addition, they also must be trained to recognize that "silent" calls may be TDD or computer modem calls and to respond appropriately to such calls as well.

Manual, II-7.3100 at 42 (emphasis in original).

The City, in moving for summary judgment, simply asserted that it does not discriminate against plaintiffs because it provides TDD calls "direct access" to 911. In other words, because no relay service is required for dialing 911, and because the City has 911 TDD capabilities, the City provides direct access to its 911 services. In its reply the City, confronted by the Department's statutorily authorized regulations and their interpretations of them, argues that the court should ignore the Manual's directive that a space bar requirement violates the ADA. The essence of this argument is that, because "there is currently no technology available whereby a 911 system can automatically detect every call from every TDD unit or computer[] without the caller hitting the space bar to emit a tone the system can understand[,]" the Department's "no space bar" requirement is arbitrary and capricious. (Def.'s Reply at 18.) In support of this position, defendant cites Chevron.

It is well settled that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Thus, when Congress has explicitly authorized an agency to promulgate regulations relating to a specific statute, "such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* This

means that the Department's ADA regulations should normally be given presumptive effect.

Moreover, "an agency's interpretation of its own regulations is given deference." *Trustees of the Cal. State Univ. v. Riley*, 74 F.3d 960, 1996 WL 29091 at *5 (9th Cir. Jan. 26, 1996). Thus, the court must "defer to the [Department's] interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [Department's] intent at the time of the regulation's promulgation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 114 S. Ct. 2381, 2386, 129 L. Ed. 2d 405 (1994) (quoting *Garnering v. Jenkins*, 485 U.S. 415, 430, 99 L. Ed. 2d 515, 108 S. Ct. 1306 (1988)). It is with this mandate that the court begins its analysis.

*Chevron* is a two step inquiry. First, the court must look to the intent of Congress and see if the agency had the power to act as it did and to determine if Congress has already addressed the issue being challenged. However, "if Congress has not directly addressed the issue, the question is whether the agency's interpretation is reasonable and based upon a permissible construction of the statute." *Romero v. Immigration and Naturalization Service*, 39 F.3d 977, 980 (9th Cir. 1994).

It is undisputed that Congress has authorized the agency action now being challenged. Moreover, the City does not argue that Congress has directly addressed the space bar issue. Thus, left with what amounts to a step two challenge, the court must inquire whether the Department's "no space bar" interpretation "is reasonable 'in light of the language, legislative history, and policies of the statute.'" *Republican National Committee v. Federal Elec. Cmm'n*, 316 U.S. App. D.C. 139, 76 F.3d 400, 1996 WL 69837, at *5 (D.C. Cir. 1996) (quoting *Natural Resources Defense Council v. United States EPA*, 261 U.S. App. D.C. 372, 822 F.2d 104, 111 (D.C. Cir. 1987)).

In enacting the ADA, Congress explicitly stated:

It is the purpose of this chapter—

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure the Federal Government plays a central role in enforcing standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b). Thus, the purpose of the ADA is clearly both broad and remedial; to ensure "the elimination of discrimination against individuals with disabilities." *Id.*

With regard to 911 service, Congress enacted the ADA with the intention that "the telephone emergency services operated by local and state governments be accessible to [hearing impaired] individuals." H.R. Rep. No. 596, 101st Cong., 2d Sess., 67 (1990). This concern was echoed in the Department's subsequent regulations. *See* 28 C.F.R. § 35.162, App. A at 471 ("The legislative history of title II specifically reflects congressional intent that public entities must ensure that telephone emergency services, including 911 services, be accessible to persons with impaired hearing and speech through telecommunication technology."). Moreover, the House Report on the ADA noted that: "Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Therefore the purpose of [section 204] is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited." H.R. Rep. No. 485 (III), 101st Cong., 2d Sess., 52 (1990).

With this as a backdrop, the court is satisfied that the Department's Manual (which interprets its regulations) is reasonable. The Manual's "no space bar" requirement is consistent with Congress' stated desire to end discrimination against individuals like the plaintiffs. Furthermore, this requirement is reasonable, for it takes into account that not all TDDs emit an audible tone when the space bar is pressed. For "no-tone" TDD users, the City's space bar requirement fails to provide them with same 911 access afforded other TDD users, let alone the non-hearing impaired public. For this reason alone the "no space bar" requirement in neither arbitrary nor capricious.

In short, the City quarrels with the Manual because it disagrees with its substantive requirements. Although it may be true that the Department's interpretation of the ADA is not the only plausible one, that is immaterial, for it also "reflects a reasonable reading of the statute." *National Republican Committee*, 316 U.S. App. D.C. 139, 76 F.3d 400, 406, 1996 WL 69837, at *5. This is all that *Chevron* requires.[2]

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[2] Although the City frames this as a *Chevron* challenge, an argument could be made that, in reality, the question at bar is governed by the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706(2) (A). First, the court notes that defendant challenges the Department's interpretation of its regulations. Such a challenge is governed by *Thomas Jefferson Univ.*, 114 S. Ct. at 2386. In that case, the party challenging the agency's interpretations did so pursuant to the APA.

Moreover, the District of Columbia Circuit Court of Appeals has recently had occasion to address the dichotomy between *Chevron* and the APA. *See Arent v. Shalala*, 315 U.S. App. D.C. 49, 70 F.3d 610 (D.C. Cir. 1995). There, the court was confronted with a challenge to the FDA's regulation defining the term "substantial compliance," as used in 21 U.S.C. § 343(q)(4)(D). Both the parties and the district court analyzed plaintiff's challenge under *Chevron*. The court of appeals, however, in a divided panel, disagreed, holding that "in challenging the FDA's regulation defining 'substantial compliance,' appellants seek traditional arbitrary and capricious review" governed by the APA and its progeny. *Arent*, 70 F.3d at 615. In the majority's view, a *Chevron* challenge concerns "'the power of an administrative agency to administer a congressionally created . . . program.'" *Id.* (alterations and emphasis in original) (quoting *Chevron*, 467 U.S. at 843). Thus, according to *Arent*, *Chevron* is concerned with whether the agency had the authority to act as it did.

The City next asserts that, even if the no space bar requirement is the law, the alternatives are administratively and financially unreasonable. The City accurately notes that the ADA does not "require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of the service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.150(a) (3).

The essence of its argument is that to equip every 911 workstation with a TDD, when coupled with other necessary equipment, the redesign of the workstations to create additional space, additional training, a budgetary increase to handle operator overtime, as well as other increased expenses, would cost approximately $1.3 million. However, this argument was first made in defendant's reply. Plaintiffs have not had the opportunity to address it. Without such an opportunity the court declines to address

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However, where the sole issue is whether the agency discharged its authority reasonably, "such a question falls within the province of traditional arbitrary and capricious review." *Id.* at 616. This is the very essence of the City's challenge.

However, even were the court to analyze this case under the APA, the City's challenge still must fail. The City charges that the Manual is arbitrary and capricious because "the record lacks any evidence that the Department of Justice has accounted for the[] technological considerations [outlined above] in dictating its 'no space bar' guideline." (Def.'s Reply at 20.) However, the City has provided no evidence that the Department did not consider technological limitations in interpreting its regulations. In fact, there is no record at all on this question. However, the burden is not on the agency to show that its interpretation is not arbitrary and capricious. Rather, "the burden of proof under the arbitrary and capricious standard is on the party challenging" the agency. *McKinley v. United States*, 828 F. Supp. 888, 892 (D.N.M. 1993); *see also Sierra Club v. Robertson*, 810 F. Supp. 1021, 1025 (W.D. Ark. 1992) ("Plaintiffs bear the burden on all issues in this case.") (Arnold, Circuit Judge, sitting by designation). Thus, absent evidence that the Department failed to consider technological limitations and that this failure was somehow unreasonable, the court cannot say that the Department's interpretive guidelines are no longer entitled to deference. *Cf. Thomas Jefferson Univ.*, 114 S. Ct. at 2386. In this regard, mere argument from counsel is insufficient.

this issue. Defendant may reassert this issue in further briefing if it so desires.

**III. The Rehabilitation Act.**

Plaintiffs also charge the City with violating the Rehabilitation Act. *See* 29 U.S.C. § 794(a). It provides, in relevant part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

*Id.*

Initially, defendant moves for summary judgment on the same basis as it did under the ADA; because it provides "direct access" to TDD callers. However, for the reasons stated above, this argument fails.

Defendant next contends that plaintiffs are not entitled to compensatory damages under the Rehabilitation Act, citing *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992). In *Franklin*, the Court held that an individual, suing under Title IX, is not limited to equitable remedies, and can recover money damages for a defendant's intentional violation of that Act.

A number of courts since have looked to *Franklin* to determine whether compensatory damages are available under Title VI. This is because the Court, in finding a damages remedy available under Title IX, cited to cases construing Title VI. These post-*Franklin* cases have uniformly held that compensatory damages under Title VI are available, but only for intentional violations of the act. *See, e.g., Tafoya v. Bobroff*, 865 F. Supp. 742, 749 (D.N.M. 1994) (collecting cases); *Tyler v. City of Manhattan*, 849 F. Supp. 1442, 1444 (D. Kan. 1994); *Miller v. Spicer*, 822 F. Supp. 158, 166-168 (D. Del. 1993). In this regard, plaintiffs assert that "Phoenix's

official policies and practice and its continuing and knowing violations of Plaintiffs' civil rights over more than a year, evinces intentional discrimination deserving of compensatory as well as punitive relief," citing as evidence the entire factual background of this case. (Pls.' Response at 15.)

Defendant fails to cite case law dealing with the level of proof necessary to find intentional discrimination in the context of the Rehabilitation Act. Nor has the court's own research unearthed any cases addressing this standard. However, the court notes that in § 1983 cases conduct is intentional when "the policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy, training, protocol or custom." *Penney v. Town of Middleton*, 888 F. Supp. 332, 340 (D.N.H. 1994) (citing *Canton v. Harris*, 489 U.S. 378, 385, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989)). Thus, the inquiry collapses into a search for evidence of such deliberate indifference.

The most that has been shown is that the Department's view of the ADA's requirements were set forth in an August 3, 1994 letter from the Department to former Mayor Paul Johnson. Although it informed the Mayor of the Department's 911 settlement with the City of Los Angeles, it made no mention of the no space bar requirement or the Department's binding view of its manual. The letter merely encouraged the City to review its 911 service to ensure that it complied with the law.

This is hardly the stuff of intentional conduct or deliberate indifference. It is a stretch to say that such a letter could create an inference that the City knew what the Department's interpretive Manual required in August of 1994, and yet chose to continue its space bar policy. For compensatory damages based on intentional conduct more compelling evidence is required. Indeed, there is no evidence before the court that the City actually knew of the Manual's requirements. Moreover, plaintiffs' position disregards the other qualities of the City's 911 system and its efforts to address the concerns of plaintiffs and persons similarly situated.

Without more explicit notice that the Manual had the force of law or that the City did not have a good faith belief that the Manual did not have the force and effect of law, the City cannot be held to have acted intentionally or with deliberate indifference to plaintiffs' rights. However, at defendant's request, discovery has been stayed essentially since the inception of this case. Plaintiffs are entitled to test the City's knowledge and belief by appropriate discovery. Hence, it is premature to resolve this issue on the current state of the record.

**IV. Plaintiffs' § 1983 claim.**

Defendant next contends that plaintiffs' § 1983 claim must be dismissed because the ADA and the Rehabilitation Act preclude such relief. In essence, the City argues that, because the ADA and the Rehabilitation Act have comprehensive remedial schemes, a § 1983 claim cannot be predicated on their violation. "This is a question of first impression in the Ninth Circuit." *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1225 (9th Cir. 1992) (Norris, J., *dissenting* from majority's dismissal for lack of standing).

It is true that, when Congress has enacted a statute with a comprehensive enforcement mechanism, a separate claim for § 1983 enforcement is not available. *Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981). However, the court must "'not lightly conclude the congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right. The burden is on the State to show by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement,'" *Madsen*, 976 F.2d at 1225 (Norris, J., *dissenting*) (emphasis added) (quoting *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 520-21, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990)). In *Madsen*, Judge Norris found that nothing in the Rehabilitation Act itself foreclosed § 1983 relief. Indeed, such a holding has widespread acceptance. *See Penney*, 888 F. Supp. at 340 (collecting cases). Moreover, this analysis yields the same result with respect to the ADA. *See Independent Housing Servs. v. Fillmore Center Assocs.*,

840 F. Supp. 1328, 1345 (N.D. Cal. 1993) (relying upon the *Madsen* dissent in holding that "the ADA does not preclude an action under section 1983"). While defendant asserts that "both the ADA and the Rehabilitation Act of 1973 have comprehensive remedial schemes," (Def.'s Motion at 14.), it does so baldly, citing nothing "from the statute itself," express, specific or otherwise, that demonstrates Congress intended to prevent § 1983 relief predicated on a violation of either the ADA or the Rehabilitation Act.

The City next argues that plaintiffs' § 1983 claim must fail because they have not produced evidence that the City acted with "at least deliberate indifference to the strong likelihood that a violation of federally protected rights" would result from its 911 policies. *See Penney*, 888 F. Supp. at 340. This argument has force for the reasons previously noted in the Rehabilitation Act discussion. The City has improved its 911 system. Again, the court cannot say that the letter to the City is sufficient evidence that it acted with "at least deliberate indifference to the strong likelihood" that maintaining its space bar policy would violate the federally protected rights of its hearing impaired citizens. But again, plaintiffs are entitled to discovery on the issue.

**V. Punitive Damages.**

Last, defendant argues that, as a matter of law,[3] punitive damages are never available under the ADA, the Rehabilitation Act or § 1983. With respect to the first two statutes, the City cites *Cortes v. Board of Governors*, 766 F. Supp. 623, 626 (N.D. Ill. 1991), in support of its position. In that pre-*Franklin* case, the court held that punitive damages are not recoverable in a Rehabilitation Act claim. However, the court "cannot rely on the case law issued prior to the Supreme Court's decision in *Franklin* to determine the propriety of

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[3] At oral argument the City, for the first time, argued that plaintiffs are not entitled to punitive damages because the facts of this case do not warrant such extraordinary relief. While the court agrees, since this theory was not briefed by either party, the court will not rely exclusively on it.

punitive damages under section 504" of the Rehabilitation Act. *Moreno v. Consolidated Rail Corp.*, 63 F.3d 1404, 1418 (6th Cir. 1995). In *Moreno*, the Sixth Circuit concluded that, in the aftermath of *Franklin*, "punitive damages are an appropriate remedy for an intentional violation of section 504." *Id.* However, since the court has concluded that, based on the current record, there is insufficient evidence of an intentional violation, punitive damages would not lie for the alleged Rehabilitation Act violation. But again, plaintiffs have not had their opportunity for discovery.

Finally, with respect to their § 1983 claim, the City is correct that plaintiffs are precluded from recovering punitive damages. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981) ("we hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983").

IT IS ORDERED granting, in civil 96-305 PHX CAM, plaintiffs' motion to consolidate (doc 7). All future pleadings in that case shall be docketed in civil 95-260 PHX RCB.

IT IS FURTHER ORDERED granting, in part, and denying, in part, defendant's motion for summary judgment (doc. 13).

IT IS FURTHER ORDERED denying defendant's motion to strike and for expedited ruling (doc. 108).

IT IS FURTHER ORDERED denying defendant's motion to revoke the participation of the United States as amicus curiae and for expedited ruling (doc. 109).

IT IS FURTHER ORDERED setting a status conference in this case for April 29, 1996, at 3:45 p.m. in courtroom #3. The purpose of this conference is to appraise the court on the progress of negotiations between the parties and to determine whether, and what, future hearings need to be scheduled.

## 29 U.S.C. § 794 (1998)

### § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

## 29 U.S.C. § 794a (1998)

### § 794a. Remedies and attorney fees

(a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

## 42 U.S.C. § 12132 (1998)

### § 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

## 42 U.S.C. § 12133 (1998)

### § 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

## 28 C.F.R. § 35.105 (1999)

### § 35.105. Self-evaluation

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.

(c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

## 28 C.F.R. § 35.161 (1999)

### § 35.161. Telecommunication devices for the deaf (TDDs)

Where a public entity communicates by telephone with applicants and beneficiaries, TDDs or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech.

## 28 C.F.R. § 35.162 (1999)

### § 35.162. Telephone emergency services

Telephone emergency services, including 911 services, shall provide direct access to individuals who use TDDs and computer modems.

U.S. Department of Civil Rights
Civil Rights Division
Office on the Americans with Disabilities Act

SEAL

# THE AMERICANS WITH DISABILITIES ACT

# TITLE II TECHNICAL ASSISTANCE MANUAL

January 24, 1992

# Department of Justice
# The Americans with Disabilities Act:

## Title II Technical Assistance Manual, January 24, 1992

### II-7.3000 Emergency telephone services

**II-7.3100 General.** Many public entities provide telephone emergency services by which individuals can seek immediate assistance from police, fire, ambulance, and other emergency services. These telephone emergency services—including "911" services—are clearly an important public service whose reliability can be a matter of life or death. Public entities must ensure that these services, including 911 services, are accessible to persons with impaired hearing and speech.

State and local agencies that provide emergency telephone services must provide "direct access" to individuals who rely on a TDD or computer modem for telephone communication. Telephone access through a third party or through a relay service does not satisfy the requirement for direct access. (However, if an individual places a call to the emergency service through a relay service, the emergency service should accept the call rather than require the caller to hang up and call the emergency service directly without using the relay.) A public entity may, however, operate its own relay service within its emergency system, provided that the services for nonvoice calls are as effective as those provided for voice calls.

What emergency telephone services are covered by title II? The term "telephone emergency services" applies to basic emergency services—police, fire, and ambulance—that are provided by public entities, including 911 (or in some cases, seven-digit) systems. Direct access must be provided to all services included in the system, including services such as emergency poison control information. Emergency services that are not provided by public entities are not subject to the requirement for "direct access."

What is "direct access?" "Direct access" means that emergency telephone services can directly receive calls from TDDs and computer modem users without relying on outside relay services or third party services.

Does title II require that telephone emergency service systems be compatible with all formats used for nonvoice communications? No. At present, telephone emergency services must only be compatible with the Baudot format. Until it can be technically proven that communications in another format can operate in a reliable and compatible manner in a given telephone emergency environment, a public entity would not be required to provide direct access to computer modems using formats other than Baudot.

Are any additional dialing or space bar requirements permissible for 911 systems? No. Additional dialing or space bar requirements are not permitted. Operators should be trained to recognize incoming TDD signals and respond appropriately. In addition, they also must be trained to recognize that "silent" calls may be TDD or computer modem calls and to respond appropriately to such calls as well.

Supreme Court, U.S.
FILED
MAY 3 1999
OFFICE OF THE CLERK

(2)

No. 98-1619

In The

# Supreme Court of the United States

WILLIAM D. FERGUSON; ELIZABETH T. FERGUSON; BONNIE P. TUCKER; JAY T. FRANKEL; BARBARA JEAN COFFMAN,

*Petitioners,*

v.

CITY OF PHOENIX, A MUNICIPALITY; LYLE RODABOUGH; AND JANE DOE RODABOUGH,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. The court of appeals held that petitioners, to be entitled to damages under the Americans With Disabilities Act Title II and Section 504 of the Rehabilitation Act, must show a public entity's "discriminatory intent." Should the Court deny certiorari of this issue where the Ninth Circuit's decision is fully compatible with this Court's opinions in *Gebser, Franklin,* and *Guardians,* and where the circuits are not in conflict?

II. The district court held that discriminatory intent means at least "deliberate indifference." Should the Court deny certiorari of this issue where the Ninth Circuit did not decide the issue, where the evidence failed to show intent under any definition of that term, and where the deliberate indifference standard is appropriate in any event?

III. Should the Court decline to review the issue of whether petitioners raised a genuine issue of material fact, where they claimed no disputed issue of fact below and where both lower courts found no genuine issue of material fact?

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## STATEMENT OF THE CASE

In an effort to make it sound like respondents (hereafter collectively "the City") "intentionally discriminated" against petitioners, or were "deliberately indifferent" to petitioners' federally-protected rights, petitioners misstate the record in several respects.

### A. The petition misrepresents the liability phase of this case. No court adjudged the City "liable" for discrimination.

The petition erroneously suggests that the City was found "liable" for discriminating against them, and that petitioners had "proven liability." Pet. at i, 6, 19. No such determination was ever made. The gist of petitioners' complaint was that the City discriminated against them by utilizing technology that required TDD callers to 911 to press the space bar on their TDD's which would emit a tone to alert the 911 operator that the call was from a TDD. The only issue decided during the liability phase of the case was whether a Department of Justice Technical Assistance Manual "Guideline" – which prohibited a 911 provider from having a space bar requirement for TDD users – was reasonable. Pet. App. at 61. The City had argued that the Guideline was arbitrary and non-binding because it failed to account for the fact that, at the time the 911 calls were made here, no technology existed to eliminate the space bar requirement. Pet. App. at 61. The district judge, however, nevertheless held that the

Guideline was reasonable. Pet. App. at 64, 10. It did not hold that the City "discriminated against plaintiffs."[1]

The Consent Decree signed by the trial court itself states, "This Order does not constitute an adjudication or finding on liability, nor shall it be construed as an admission by the City or a finding of wrongdoing or violation of any applicable Federal law or regulation." Pet. App. at 45. Petitioners therefore err in suggesting that the lower court adjudged, or that they "proved" the City "liable" for discrimination.

**B. The petition erroneously intimates that the City entered into the Consent Decree because liability "was proven" or because the City was found to have "discriminatory policies." In truth, the City entered the Consent Decree because it had already implemented new technology that satisfied petitioners.**

The petition erroneously insinuates that the City was ordered in the Consent Decree to "modify its discriminatory policies." Pet. at 6. In truth, the City entered into the Consent Decree because, while the City's motion for summary judgment was pending in this case, the City learned of and already had begun implementing new technology

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[1] In fact, what the district court ruled was that the space bar requirement failed to provide the same 911 access to "no-tone" TDD users as for "tone-emitting" TDD users and hearing callers. Pet. App. at 64. Plaintiffs here were not "no-tone" TDD users and therefore were not even members of the class of persons whom the trial court found were treated differently.

that would eliminate the space bar requirement, thus satisfying plaintiffs' claim for injunctive relief.

Only after the City had begun the implementation did the district court rule that the previous technology treated "no-tone" TDD callers differently than "tone-emitting" TDD callers and hearing callers, and that the DOJ's Guideline prohibiting a space bar requirement was not arbitrary. Pet. App. at 64. Because the City had already taken steps to eliminate the space bar requirement, however, in June the City entered into a Consent Decree with plaintiffs and the Department of Justice agreeing to eliminate the space bar requirement, which resolved the liability portion of the case.[2]

### C. The petition misrepresents the City's response to Ferguson's 911 calls.

#### 1. The August, 1994 calls.

Petitioners' intimation that the City callously "hung up" on Ferguson, disconnected him, or refused to respond to his 911 calls, misstates the record. Pet. at 3-4. When Ferguson first called 911 from his TDD, the 911 operator answered the call three seconds later, but heard

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[2] Indeed, for two years after the Consent Decree, respondents were required to file periodic audit reports detailing the success of the new system. Pet. App. at 50. Petitioners conducted an on-site evaluation of the system, and had the right to return to district court if any disputes arose. *Id.* Neither petitioners nor the Department of Justice ever raised any objections or problems.

no TDD "tone."[3] Per police department policy for **all** silent 911 calls, the operator disconnected and immediately called plaintiff back. Hearing a busy signal, the operator requested U.S.West to break through the line and was advised of no conversation. The operator then heard another 911 operator taking Ferguson's second call through the TDD, which was answered in four seconds. Ferguson this time initiated the TDD tone, and the call was immediately transferred to the TDD station. The TDD operator sent the pre-programmed TDD message asking what the emergency was, but Ferguson did not respond. In accordance with policy for **all** silent 911 calls, an officer was dispatched to plaintiff's home on a Priority Two 911 hang-up. Pet. App. at 7.[4] The officer arrived at Ferguson's home less than 16 minutes after his first 911 call, well within the average response time for Priority Two calls from hearing persons. CR 14, ¶ 19-21.[5]

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[3] At the time Ferguson made his 911 calls, TDD calls rang into the 911 facility exactly the same way as regular 911 calls. The 911 operators responded to the calls in exactly the same manner and with exactly the same speed. CR 14, ¶ 6. Because the calls rang in to the 911 Center exactly the same way as regular calls, a TDD caller had to initiate an audible "tone" that would indicate that this was a TDD call. There was no 911 system available at that time that could automatically "detect" (without the caller initiating an audible tone) that a call was coming from a TDD system. CR 14, ¶ 7.

[4] In the meantime, Ferguson made two more calls, again failing to initiate the audible tone. *Id.* Since the caller's address was Ferguson's, however, the information was stored with the incident already dispatched.

[5] CR refers to the Clerk's Index of Record. These items will be included in the Joint Appendix should the Court accept certiorari.

### 2. January 1995 calls

On January 30, 1995, Ferguson called 911 to complain about kids throwing rocks at his car. The call was answered in 4 seconds but no audible tone or voice was heard. The operator disconnected and immediately called Ferguson back and received a busy signal. Upon asking U.S.West to interrupt the line, the operator received no answer and immediately dispatched an officer to Ferguson's home on a Priority Two 911 hang-up call. CR 14, ¶ 22-23.

In the meantime, Ferguson made three more phone calls, and this time he did initiate the tone. Although these operators did not initially recognize the tone, the calls were processed on the TDD, and two operators conversed with Ferguson. The officer, however, had been dispatched to his home after the first "no response," in accordance with department policy for all 911 calls, and arrived less than ten minutes later – the same as it would have been if the call had been placed from a regular telephone. CR 14, ¶ 24, 25, 28.

## D. The petition ignores the City's undisputed Herculean efforts to provide maximum access to TDD users accessing Phoenix 911. Both lower courts found no evidence of an intent to discriminate, regardless of how "intent" is defined.

Petitioners' attempt to portray the City as callously indifferent to their attempts to access 911 is wholly unsupported by the record. As the district court specifically noted, "the evidence shows a diligent effort on the

part of defendants to upgrade their 911 system." Pet. App. at 36. *See also* Pet. App. at 40.

### 1. Commander Rodabough promptly responded to Ferguson's complaint and evaluated the 911 Center's TDD capabilities.

After his August calls to 911, Ferguson filed a complaint with the City. This was the first complaint the City had received about a problem accessing 911 via TDD. Within two weeks, Cmdr. Rodabough, Commander of the Phoenix Police Department's Communications Bureau, had the matter investigated and responded to Ferguson. In his response, Rodabough indicated that he had evaluated the TDD system, was dissatisfied with it, and had begun exploring options to improve service. CR 95, ¶ 18.

### 2. The City upgraded its system twice in the next year – in April, 1995, and again in August, 1995.

Cmdr. Rodabough thought the previous system left too much room for human error, so he began to search for a system that would better serve the needs of the hearing impaired. U.S.West, which controls Phoenix 911, recommended a new "detector" system which the City installed in April or May of 1995. The detector system was not satisfactory, however, and the City had it removed and continued its search for another solution. CR 95, ¶ 17, 19.

U.S. West next suggested a diverter system which would pick up the TDD Baudot tone and automatically

"divert" the call to the TDD machine, eliminating any human error factor in recognizing the tone (which sounds very much like a fax tone).[6] With the diverter, regardless of whether the call came in to a workstation equipped with a TDD machine or not, the call would still have to be diverted from the phone equipment to the TDD equipment. At that point, the 911 operator could simply begin conversing with the caller. CR 95, ¶ 20; CR 14, ¶ 11. Additionally, any TDD call would automatically be bumped ahead of any other waiting calls. CR 14, ¶ 9.[7]

The Communications Bureau received a brochure for the diverter equipment. The brochure stated, **"Meets all ADA requirements for "Direct Access" to emergency telephone lines, including 911."** CR 229, Exhibit D. The brochure helped Cmdr. Rodabough and his staff decide to try the diverter, which they installed in August, 1995. CR 229, ¶ 2; CR 95, ¶ 20. As suggested in the diverter brochure, **all** silent calls were treated the same, that is, when the operator received silence on the line and could

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[6] Petitioners' assertion that "properly trained" 911 operators can recognize TDD tones because they are "easily distinguishable from" fax or computer modem tones misrepresents the record. Pet. at 3, n.1. The record is devoid of evidence about "properly trained" operators; moreover, the record establishes that the TDD tones sound just like fax tones (CR 95, ¶ 20).

[7] Petitioners' slight that the City at that time "only" had two operator positions equipped with TDD is unfounded. Pet. at 4. Additional TDD equipment would not have eliminated the need to transfer to the TDD. Moreover, there is no evidence that Phoenix 911 needed more than two TDD machines to handle the relatively few TDD calls that it received yearly.

not reach the caller with a call-back, an officer was dispatched to the caller's address on a Priority 2 "911 hang-up" call. CR 14, ¶ 16, 18, 23, 28.

### 3. The City kept evaluating its system to ensure that it was the best available.

In the summer of 1995, in a continuing effort to determine the best system available, Cmdr. Rodabough attended the National Emergency Number Association ("NENA") conference in Nashville. He specifically asked the NENA presenters about Phoenix's TDD system technology, and they did not recommend any changes to Phoenix's 911 system. CR 95, ¶ 21; ER 509-10.[8] He came away from the seminar believing that "we are in complete compliance with the ADA." *Id.* Cmdr. Rodabough and his staff nonetheless contacted their counterparts in Denver, San Diego and Los Angeles to find out what equipment and procedures those cities used to serve the hearing impaired. Based upon the information he had received, Cmdr. Rodabough believed in good faith that the City, with the new diverter system, had installed a state-of-the-art system which fully complied with the ADA. CR 95, ¶ 22.

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[8] ER refers to the Excerpt of Record required by Ninth Circuit Rule 30-1 to be filed in place of the F.R.A.P. 30 Appendix.

### 4. The City upgraded its TDD service yet again in September, 1995.

Again continuing in good faith to evaluate and upgrade its system, in September 1995, the City implemented another new procedure for communicating with TDD callers to 911. Upon receiving a silent call, an operator could press "5#" and automatically send a TDD message directing the potential TDD caller to press the space bar. Pet. App. at 56. If it was a TDD caller, once the caller pressed the space bar and emitted the tone, the diverter would automatically connect the caller with the TDD station. This transfer occurred almost instantly, within seconds.[9]

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[9] It was *after* this time that petitioners Tucker and Frankel/Coffman made their November and December 1995 calls to 911. By this time, of course, respondents were already in the process of evaluating, researching and upgrading the 911 system. Pet. App. at 40. Petitioners Frankel and Coffman were not even aware of the upgrades (CR 171). In fact, when Ms. Coffman later contacted 911, she was "pleased that [911] responded right away." She testified that she received the kind of response she hoped to receive each time she calls 911, and did not have any difficulties in communicating by TDD. Ms. Coffman testified that she does not believe the City of Phoenix intentionally discriminated against her. *Id.*

With respect to Tucker's call, the record demonstrates that Tucker was experiencing trouble getting through to 911 on her father's TDD that day; that the supervisor asked her to make some test calls; that during one of those test calls, an officer had already arrived on the scene; and that during the test calls, U.S. West detected and reported a potential line problem. (ER 188-190).

**5. The City upgraded its system once again in the spring of 1996 to eliminate the space bar requirement and allow TDD capability from each operator's keyboard.**

In late February 1996, just before the parties argued the City's pending motion for summary judgment, the City first learned of special keyboards that would allow TDD capability right from the keyboard. This new technology would permit each operator to "query" silent lines to determine if it was a potential TDD caller, and to call back via both hearing phone and TDD right from the keyboard. This would eliminate the need to press the space bar, for separate TDD equipment, and for the diverter system. CR 144.

Respondents immediately began researching whether they could utilize this technology at the Phoenix 911 Center, and informed the district court of this new development at the March 4, 1996 summary judgment oral argument. CR 127 at 20. By March 25, 1996, the City had not only determined technological compatibility, but had requested funding from the Police Chief's Office. CR 144, ¶ 4-5. By April 26, 1996, the date of the district court's first ruling, new keyboards had been ordered for each workstation. CR 155. The parties entered into the Consent Decree in June, 1996.

On July 10, 1996, less than six months after first learning of the new technology, the City completed installation of the new keyboards, which eliminated the need for TDD callers to press a space bar to emit Baudot tones. As far as the City knew, and as the undisputed record

demonstrates, before February 1996, no technology existed whereby the City could have eliminated the space bar requirement. CR 212; CR 14.[10]

**E. The record is devoid of evidence that the City was notified of any problem with the space bar technology before Ferguson's complaint in this case and/or "turned a blind eye." The lower courts found exactly the contrary.**

Both lower courts soundly rejected petitioners' argument, and their "evidence" from which they argued that respondents knew or should have known of discrimination or a space bar problem and turned a blind eye. Pet. App. at 40 ("To the contrary, the evidence shows that defendants acted both promptly and in good faith in attempting to upgrade their 911 service"); and at 15 ("There is nothing to show, even suggest, any deliberate indifference or discriminatory animus on the part of the City towards plaintiffs").

The record fully supports those rulings. Contrary to petitioners' assertion that the City "failed to train its 911 operators," Pet. at 4, the record is replete with evidence of extensive TDD training. The district judge specifically found no evidence that the City had any notice that its

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[10] The court of appeals erred in stating that the parties "disputed" whether or not the technology to eliminate the space bar requirement previously existed. Pet. App. at 16. Petitioners never even argued, let alone came forward with any evidence demonstrating that such technology existed before the City learned of and implemented it.

training was at all inadequate under the ADA. Pet. App. at 38.

Likewise, the trial court soundly rejected petitioners' contention, made yet again here (Pet. at 4-5), that the City was somehow put on notice of some problem with its space bar technology. For each of petitioners' claimed items of "notice," the trial court found that it "in no way creates an inference that the city was deliberately indifferent to the requirements of the ADA." Pet. App. at 33-40.[11] Even reviewing the trial court's factual analysis de novo, the appellate court concurred, Pet. App. at 16, finding that petitioners' evidence could not lead a rational trier of fact to find for them. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The record belies petitioners' attempt to paint a different picture.

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[11] Those items were: (1) a DOJ letter to the City advising of a settlement with the City of Los Angeles, which letter made no mention of the space bar, Pet. App. at 36, 67; (2) non-specific "complaints" made to the Arizona Council for the Hearing Impaired, which the City nonetheless **always** followed-up, Pet. App. at 39; (3) a promotional mailing of an E.A.S.E. training packet sent to the Mayor's office to get the City to buy it, Pet. App. at 36-37; (4) Ferguson himself restating his complaint about 911 at a public meeting, Pet. App. at 39; and (5) petitioner Tucker sending respondents' counsel pages from her legal treatise during the course of this litigation, Pet. App. at 38.

## THE COURT SHOULD DENY THE PETITION

The Ninth Circuit's decision that damages are not available under the ADA Title II or the Rehabilitation Act absent a showing of discriminatory intent is fully consistent with this Court's decisions in *Franklin v. Gwinnett*, 503 U.S. 60 (1992), *Guardians Assoc. etc., et al. v. Civil Service Comm'n*, 463 U.S. 582 (1983), and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). Circuit court decisions are also in accord. The decision was plainly correct, and no conflict among the circuits is even asserted.

The Court also need not resolve the question of what "standard" of intent applies. The Ninth Circuit declined to resolve this issue because, as both lower courts found, the evidence in this case fails to even approach a showing of discriminatory intent under **any** previously-articulated definition of that term – discriminatory animus **or** deliberate indifference. In any event, the district court's application of the deliberate indifference standard was legally and factually appropriate.

Finally, the Court should not review petitioners' third question presented – whether they showed a genuine issue of material fact. Petitioners steadfastly maintained in the trial court that **no** genuine issue of fact existed. They argued in a cross-motion for summary judgment that they were entitled to damages as a matter of law. CR 219 at 2, 6. They cannot now assert that a fact issue exists. In any event, this purely factual matter is not worthy of this Court's review.

## I. THE NINTH CIRCUIT'S OPINION IS PLAINLY CORRECT. ALL THE CIRCUITS THAT HAVE ADDRESSED THE ISSUE ARE IN ACCORD.

1. In *Guardians Assoc. v. Civil Service Comm'n*, this Court set forth the intentional discrimination standard necessary for obtaining compensatory damages under the 1964 Civil Rights Act, Title VI. Writing for the Court, Justice White said:

> **In the absence of proof of discriminatory animus, compensatory relief should not be awarded to private Title VI plaintiffs; unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations.**

462 U.S. 582, 103 S. Ct. 3221, 3223 (1983). The Title VI standard applies here because the Rehabilitation Act specifically incorporates Title VI's remedies for intentional violations, and the ADA Title II specifically incorporates the remedies of the Rehabilitation Act. 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 12133. Pet. App. 71, 72.

Every other Title II/Rehabilitation Act case that has examined the issue has required a showing of intentional discrimination before allowing damages. *See e.g. Bartlett v. New York State Board of Bar Examiners*, 156 F.3d 321 (2d Cir. 1998); *Matthews v. Jefferson*, 29 F. Supp.2d 525, 535-36 (W.D.Ark. 1998); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 133 n.10 (D.Conn. 1997); *Tafoya v. Bobroff*, 865 F. Supp. 742 (D.N.M. 1994), *aff'd*, 74 F.3d 1250 (10th Cir. 1996); *Lewis "Toby" Tyler v. City of Manhattan*, 849 F. Supp. 1442 (D.Kan. 1994), *aff'd*, 118 F.3d 1400 (10th Cir. 1997); *DeLeo v. City of Stamford*, 919 F. Supp. 70, 72 (D.Conn.

1995); *Adelman v. Dunmire*, 1996 WL 107853 (E.D.Pa. 1996); *Miller v. City of Johnson City*, 1996 WL 406679 (E.D.Tenn. 1996); *Burke v. Commonwealth of Virginia*, 938 F. Supp. 320, 323-4 (E.D.Va. 1996), *aff'd*, 114 F.3d 1175 (4th Cir. 1997); *Wood v. President and Trustees of Spring Hill College*, 978 F.2d 1214 (11th Cir.1992). *See also Smith v. University of Washington Law School*, 2 F. Supp.2d 1324 (W.D.Wash. 1998) (Title VI). Petitioners have cited no authority holding that damages are available for unintentional discrimination.[12]

The intentional discrimination requirement for recovering compensatory damages should be contrasted with the standard for simply showing a violation of the Act, which does not require discriminatory intent. *Guardians, supra*, 103 S. Ct. at 3223. The issue at bar is not whether the City "violated" the ADA. *See* Pet. App. at 31. The only issue presented is whether petitioners are entitled to damages, which requires an examination of the City's intent. Consequently, petitioners' argument regarding the importance of accessibility to emergency services, Pet. at 13-15, is irrelevant to the analysis of the issue presented. No one disputes the importance of ensuring access to

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[12] Neither *Niece v. Fitzner*, 922 F. Supp. 1208 (E.D. Mich. 1996) nor *Hernandez v. City of Hartford*, 959 F. Supp. 125 (D.Conn. 1997) holds that damages are an appropriate remedy for unintentional violations of Title II, as petitioners seem to assert. Pet. at 20, n.16. Both cases involved intentional discrimination, and *Hernandez* was an employment case. *Niece*, 922 F. Supp. at 1219; *Hernandez*, 959 F. Supp. at 134, n.10.

emergency services; but the standard for a violation is simply not an issue here.[13]

2. The ADA's legislative history also supports the Ninth Circuit's opinion, contrary to petitioners' assertion. Pet. at 11-12. In 1992, fully aware of the 1983 *Guardians* "no damages unless intentional" interpretation of the Civil Rights Act Title VI, Congress drafted Title II to specifically incorporate the remedies of § 504, which specifically incorporates the remedies – and the *Guardians* interpretation – of Title VI. Had the remedies under § 504 been inadequate, Congress would have broadened them when it enacted the ADA, rather than specifically incorporating them by reference. Congress is presumed to have known of the Title VI judicial interpretation when it enacted the ADA. *Lorillard v. Pons*, 434 U.S. 575, 580-81, 98 S. Ct. 866, 869-70 (1978).

Congress has never amended Title II/§ 504, either, despite the plethora of published judicial decisions limiting damages to cases of intentional discrimination. This contrasts with the 1991 and 1995 Congressional amendments to Title I which, for the first time, provided a limited damage remedy for intentional employment discrimination "in addition to" any relief authorized by the Civil Rights Act. 42 U.S.C. § 1981a(a)(1) and (b) (1991); 2 U.S.C. § 1311(a)(1) and (b)(3)(B) (1995). Had the ADA already "presumptively" required all plaintiffs to receive

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[13] Equating the standard for a violation with the standard for recovering damages is the mistake made by the dissenting judge in *Tyler v. City of Manhattan*, 118 F.3d 1400, 1407-1416 (10th Cir. 1997), whom petitioners cite extensively. Pet. at 14, n.11; at 15, n.13; and at 20, n.16.

damages, as petitioners argue, Pet. at 11, n.9, then enactment of the 1991 law giving damage rights to employment plaintiffs "in addition to" those under the Civil Rights Act, would have been unnecessary.

3. Petitioners err in suggesting that victims of unintentional discrimination are "left without a meaningful remedy." Pet. at 16, 19. Not only is injunctive relief available for unintentional violations of the Act, but it is the most effective means of furthering the law's policy to eliminate municipalities' discriminatory practices. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (the purpose of Title VI and Title IX is to protect people from discrimination; as opposed to Title VII, the purpose of which is to "compensate" people for past discrimination). Injunctions force public entities to spend their resources eliminating discriminatory practices for **all** disabled citizens rather than using those resources to pay large compensatory damage awards to benefit select individuals. Under no circumstances are public entities "absolved of the responsibility for redressing the injuries" resulting from discrimination, as petitioners argue. Pet. at 15.[14]

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[14] Rather than focus on the defendant's intent (or lack of it), petitioners would inflict damage awards on public entities simply because all discrimination is "abhorrent." Pet. at 16. This position fails to serve the purpose of the ADA – to actually eliminate the discriminatory practices, not to provide a windfall for the first plaintiff to reach the courthouse steps. It is precisely because most discrimination results from benign neglect, and can be quickly remedied with injunctive relief, that injunctive relief is most appropriate.

In cases of unintentional discrimination, injunctive relief is the most appropriate from the public entity perspective as well. Neither Title II, § 504, nor Congressional regulations specifically proscribes the space bar or any particular conduct.[15] Rather, because the needs of the disabled community are as widely divergent as the financial and practical circumstances among municipalities, the law remains flexible as to the practicalities of what municipalities must do to comply. For example, while a public entity need not take any action that would "fundamentally alter" its service, or result in "undue financial and administrative burden," 28 C.F.R. § 35.164, the practical application of these terms will differ depending on each municipality's circumstance. Keeping the obligations broad enough to be flexible, however, necessarily requires those obligations to be ill-defined; and municipalities are more likely to unintentionally discriminate where their obligations are not clear. Under these circumstances, injunctive relief to direct the entity into compliance is the most appropriate means of resolving the problem for all citizens. Damage awards are appropriate only where the entity is notified of plaintiff's needs and flagrantly or recklessly disregards them. *See Gebser, supra* (Title VI damage remedy would divert federal funding from beneficial uses where defendant is unaware of discrimination and is willing to institute prompt corrective measures).

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[15] Congressional regulations state only that local agencies must provide "direct access" to persons using TDD's. 28 C.F.R. § 35.162; Pet. App. at 73. According to the Department of Justice, "direct access" means the 911 provider cannot use a relay service. Pet. App. at 75-76.

4. Petitioners' insinuation that damages are a "presumptive" American "right" is inaccurate. Pet. at 17. The law presumes only that "all appropriate remedies" are available unless Congress has expressly indicated otherwise. It does not presume that damages are always appropriate. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028, 1032 (1992).[16] They were appropriate in *Franklin* precisely because the sexual harassment alleged was an intentional act of discrimination under Title IX; and compensatory damages are appropriate to redress intentional acts of discrimination. 112 S. Ct. at 1037. But neither the presumption nor "make whole remedies" applies to unintentional violations of Title VI. *Guardians*, 103 S. Ct. at 3229. Since § 504 and Title II expressly incorporate the remedies of Title VI, and no more, the presumption, if any, is that § 504/Title II plaintiffs' remedies are similarly limited to declaratory and injunctive relief in cases of unintentional discrimination.[17]

Here, the issue is not whether damages are available under Title II/§ 504, but whether they are appropriate. In

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[16] *Bell v. Hood*, 327 U.S. 678 (1946), like *Franklin*, holds that the federal courts have the jurisdiction to award "appropriate" relief as long as a cause of action exists under the Constitution or federal laws. 327 U.S. at 684. *Bell* does not hold that damages are appropriate for every claim, as petitioners insinuate. Pet. at 16. *See Gebser*, 118 S. Ct. at 1996 (interpreting *Bell*).

[17] *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 104 S. Ct. 1248 (1984), which petitioners cite at 17, n.14, does not help them here. Darrone alleged intentional discrimination in employment. The Court ruled that having done so, he could sue for backpay. The backpay was in the nature of equitable relief, not damages. *Darrone*, 465 U.S. at 630.

this regard, both lower courts correctly held that damages are not an appropriate remedy where the record is undisputed that the City, immediately after receiving Ferguson's complaint, went to great lengths to upgrade its entire TDD system and remedy the situation that Ferguson first brought to its attention. The lower courts' ruling comports with every published federal decision that has analyzed the subject and with the policy considerations outlined above. Certiorari should be denied.

## II. THE COURT SHOULD DECLINE TO ADDRESS THE MEANING OF "INTENTIONAL DISCRIMINATION"

1. The Ninth Circuit did not resolve the issue of how to define the term "intentional discrimination" because the undisputed evidence showed no intentional discrimination by the City, regardless of how that term is defined. Pet. App. at 15. Moreover, as the district court noted, the parties "actually appear[ed] to agree on the relevant standard to apply." Pet. App. at 32 (referring to the deliberate indifference standard). For these reasons, this Court should similarly decline to address the issue. *Miles v. Apex Marine Corporation*, 498 U.S. 19 (1990) (declining to address question whose resolution is unnecessary to Court's decision on narrow question presented); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988) (declining to consider question not considered by court of appeals).

2. The district court correctly determined the issue in any event. In *Gebser v. Lago Vista Indep. Sch. Dist.*, 524

U.S. 274 (1998), this Court declared that "deliberate indifference" is the correct standard for determining the availability of damages under Title IX. The *Gebser* holding applies because Title IX is modeled after Title VI, *Gebser*, 118 S. Ct. at 1997, the same statute from which the ADA directly takes its remedies.

*Gebser*'s reasoning is also persuasive here. The Court noted that Title IX's express remedial scheme presupposes notice to the entity and an opportunity to rectify any violation. From this the Court reasoned that damages are appropriate only when the entity makes an "official decision" not to remedy the violation. This "official decision" presumes that the official with authority to act has notice of the discrimination and refuses to act, which roughly parallels the deliberate indifference standard. 118 S. Ct. at 1999. Title II of the ADA similarly applies to "official decisions," and thus implicates the deliberate indifference standard, because Title II applies to discrimination **by public entities**, not by individuals. Discrimination by public entities – as opposed to their employees – presupposes notice to the entity and an "official decision" to deny benefits or to not remedy a violation. For this reason, the district court appropriately applied the deliberate indifference standard.

It is precisely because the ADA Title II proscribes conduct by public entities that the *Gebser* Court's analogy to the deliberate indifference standard for municipal liability under 42 U.S.C. § 1983 applies with force here. The Court reasoned that a lower standard raises the risk that the entity would be liable in damages not for its own official decision, but for its employees' independent actions. Not surprisingly, this is the same reasoning the

district court below used in granting the City summary judgment. Pet. App. at 32, 67.

Finally, *Gebser* itself belies the petitioners' argument that the deliberate indifference standard is reserved for punitive damages. Pet. at 21. *See also Board of County Commissioners v. Brown*, 520 U.S. 397 (1997) (deliberate indifference triggers municipal liability under 42 U.S.C. § 1983; requiring municipal decisionmakers to be aware of and acquiesce in pattern of constitutional violation).

3. Arguably, the district court's "deliberate indifference" standard does not conflict with the Second and Seventh Circuits' definition of "intentional discrimination," as petitioners assert. Pet. at 19-21. In *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998) and *Love v. McBride*, 896 F. Supp. 808 (N.D.Ind. 1995), *aff'd sub nom Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996), the courts defined "intentional discrimination" as a knowing, deliberate or willful refusal to accommodate. At least two cases have equated this standard with the "deliberate indifference" standard used here. *Memmer v. Marin County Courts*, 1999 WL 104739 at *2 (9th Cir. 1999); *Proctor v. Prince George's Hospital Center*, 32 F. Supp.2d 820, 829 n.6 (D.Md. 1998). In truth, then, there is no conflict for this Court to resolve.

4. Resolution of the standard of intent would not make a difference in this case in any event. Regardless of whether the Ninth Circuit's "deliberate indifference" standard is the same as the Second and Seventh Circuits' "knowing, deliberate or willful refusal to accommodate," or whether it lies somewhere in between "knowing,

deliberate, willful" and "discriminatory animus," petitioners' evidence did not show intentional discrimination under any definition of that term. Under no circumstance has any federal appellate court found a public entity liable for damages under Title II or the Rehabilitation Act where, as here, the entity made every attempt to **give** access rather than deny it, and where the discriminatory impact of the service it provided was not obvious and not known or intended. The Court should deny certiorari.

## III. THE COURT SHOULD DECLINE TO ADDRESS PETITIONERS' FACTUAL ISSUE

1. As noted above, petitioners steadfastly maintained in the trial court that **no** genuine issue of fact existed. They never contended that the facts were disputed or that a fact question existed. They argued in a cross-motion for summary judgment that they were entitled to damages as a matter of law. CR 219 at 2, 6. They cannot now assert that a fact issue exists.

2. Petitioners misstate the record in declaring that the Ninth Circuit "acknowledged the existence of significant factual disputes." Pet. at 22. The Ninth Circuit actually stated, "The district court found that there were no genuine issues of material fact in dispute which under the common summary judgment standard would preclude summary judgment in favor of the City and Commander Rodabough, nor do we." Pet. App. at 16. The court of appeals held that petitioners' evidence simply and completely failed to show any intent to discriminate. *Id.* ("any evidence of deliberate indifference or discriminatory animus is totally lacking"). The Court should deny

certiorari. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

## CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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May 3, 1999